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No. 14,706

In the
United States Court of Appeals
For the Ninth Circuit

PACIFIC FAR EAST LINES, INC., a Corpora-
tion,

Appellant,

vs.

JOHN WILLIAMS,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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In the
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PACIFIC FAR EAST LINES, INC., a Corporation,
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Appellant,

vs.

JOHN WILLIAMS,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

JURISDICTION

Plaintiff and Appellee, John Williams, on October 29, 1952, was injured while working as a longshoreman on board the SS FLEETWOOD. He was in the employ of the West Coast Terminals, Incorporated, who, as an independent contractor, was loading cargo on the vessel for the operator, Pacific Far East Line, Inc. the defendant and appellant. The vessel was moored at Alameda reefer dock, Alameda. A few minutes after 1:00 AM of that day, Williams, when about to descend a ladder into the No. 5 hatch, slipped and fell into the hold causing injuries.

On October 27, 1953, suit was filed by Williams against Pacific Far East Line, Inc. in the United States District

Court for the Northern District of California, Southern Division for damages in excess of \$3,000.00, exclusive of interest and costs, alleged to have resulted from the fall. The complaint alleged negligence on the part of the defendant and also unseaworthiness of the FLEETWOOD to be the proximate cause of his injuries. The right to recover damages was expressly based on the general maritime law. Appellee was a citizen of the State of California. Appellant is a citizen of the State of Delaware. The court below had jurisdiction because of diversity of citizenship under Section 1332 of Title 28 of the United States Code.

The case was tried before a jury, beginning November 8, 1954. At the close of plaintiff's case defendant moved for a directed verdict on the ground of insufficient evidence to warrant submission to a jury the questions of negligence or unseaworthiness raised by the evidence (283, 297).^{*} It also moved for a directed verdict at the close of the case on the same grounds. Both motions were denied. On November 17 the jury returned a verdict for \$35,500 and judgment was entered accordingly (20, 21). On November 26, 1954, defendant and appellant filed its motion for judgment notwithstanding the verdict and in the alternative for a new trial. This motion was heard December 3, 1954, and an order entered December 10 granting the motion with the privilege to plaintiff of remitting all damages over \$28,000, upon the doing of which the motion would be denied (35). Plaintiff thereafter remitted all damages over \$28,000. Thereafter, and within the time allowed by law, defendant (appellant) perfected this appeal. The jurisdiction of this Court is sustained by Sections 1291 and 1294 of Title 28 of the United States Code.

^{*}Otherwise unidentified Arabic numerals in parentheses are page references to the printed transcript.

CONCISE STATEMENT OF THE CASE

Williams returned with other members of the hold gang at 1 o'clock in the morning to lift the plugs off the forward section of No. 5 hatch in order to go below and resume the stowing of frozen cargo. He and another longshoreman went down the ladder at the forward end of the hatch a distance of a few feet to the top of the plugs to hook the cargo fall onto the key plug. When the plug had been hooked on he climbed up the ladder and went toward the offshore side of the vessel along the top of the hatch coaming. When the key plug had been lifted out of the way he immediately returned along the coaming to a point on the coaming above the ladder, and when he had done so stepped back with one foot to descend the ladder. At that point he slipped and fell into the lower hold through the opening left by removal of the plug.

Plaintiff introduced some evidence designed to prove (1) that the light in the square of No. 5 where plaintiff was working was dim, and that this was brought about by (a) failure to provide sufficient lights in or above the square of the hatch where plaintiff was working and (b) failure of defendant to have on overhead or ceiling lights in the wings of No. 5 hold; and (2) that when the key plug was removed, leaving an opening of about 9 feet in length and 4 feet in width into the reefer hold, cold air in the hold contacting warmer air above caused moisture or frost to form on the coaming at about plug level, and more particularly on the steps of the ladder in No. 5 hatch above the plug level.

THE PLEADINGS

The complaint alleged that defendant was negligent in five respects, that the vessel was unseaworthy in the same five respects, and that plaintiff's injuries were proximately

caused by negligence of the defendant and unseaworthiness of the vessel. The defendant's answer denies negligence in all the respects charged and makes the same denials in respect to unseaworthiness. The answer alleges negligence on plaintiff's part proximately causing his injuries and also alleges that the injuries were caused by risks and hazards inherent in the work, and that plaintiff was aware of these risks and hazards and assumed them.

THE FORMAL ISSUES IN THE PLEADINGS

(1) Was there any negligence on the part of defendant which created working conditions not reasonably safe?

(2) Was the vessel unseaworthy?

(3) If a finding is warranted that there was negligence on the part of defendant, or unseaworthiness of the vessel, was either a proximate cause of the accident resulting in injury to the plaintiff?

(4) Was the accident and resulting injury due to risks or hazards of plaintiff's work on a reefer vessel, and more particularly in or about freeze hatches?

(5) Was the accident and resulting injury to Williams due to plaintiff's own negligence?

PRINCIPAL ISSUES OF FACT

The most important issues of fact raised by the evidence are the following:

(1) Was the light at the point where plaintiff slipped and started to fall insufficient?

(2) Would the overhead or ceiling lights in No. 5 hold, if on, have furnished any light on the top of the hatch coaming or even on the steps of the ladder above the hatch plugs in the forward part of the hold?

(3) In the short interval of time between the time when the key plug was lifted out and when Williams started to climb back into the square of the hatch, was any moisture or frost created on the top of the coaming where it appears plaintiff slipped and fell, or if he did not slip there, on any upper part of the ladder?

PRINCIPAL QUESTIONS OF LAW RAISED

1. If the ceiling lights in the 'tween deck hold were in fact off, did that constitute any unseaworthiness, considered in the light of the purpose for which those fixtures were intended and used, or actionable negligence on the part of defendant?

2. Did the furnishing by the ship operator of sufficient lights, and electricity to operate them, discharge its duty to the longshoremen in regard to lighting?

3. If there was insufficient light under the circumstances existing, was it a transitory condition for which the ship operator is not liable in the absence of notice and reasonable opportunity to correct?

4. Should the Court below have instructed the jury on the issues mentioned above as requested by appellee, and also as to

(a) whether the plaintiff was contributorily negligent in voluntarily proceeding into an area insufficiently lighted, and

(b) whether the risk of slipping on moisture or frost was an inherent and known risk or hazard of working in and about freezer compartments, and assumed by plaintiff?

5. Should the Court below have instructed the jury to disregard all evidence relating to the ceiling lights in the 'tween deck compartment?

SPECIFICATION OF ERRORS RELIED UPON

1. The Court below erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence sufficient to warrant submission to the jury that appellant negligently failed to provide appellee with a reasonably safe place to work, proximately causing injury to appellee.

2. The Court erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence sufficient to warrant submission to the jury that appellant's vessel, the SS FLEETWOOD, was unseaworthy in any respect, proximately causing injury to appellee.

3. The Court below erred in denying appellant's requested instructions Nos. 4A, 4B, 7A and 7B which would have submitted to the jury the question of whether the conditions complained of by appellee in the area from which he fell were a basis for a finding of negligence or unseaworthiness under the "transitory" conditions rule. The requested instructions are set out in the printed record at pages 28, 29, 30 and 31 and are as follows:

No. 4A

"If you shall find that the plaintiff was caused to fall by reason of lack of adequate lighting at the point from which he fell into the forward end of #5 hatch of the FLEETWOOD, that fact would not of itself warrant you in finding that the vessel was unseaworthy. To justify such a conclusion it must appear that the defendant knew of the inadequacy of the lighting at that point, or that it had existed such a length of time that in the exercise of ordinary care the defendant ought to have known of it and remedied it, and had thereafter unreasonably failed to furnish sufficient lighting for the work

being performed at the time; since the defendant is not liable for a mere transitory condition of such a character."

No. 4B

"If you find that plaintiff was caused to fall into the No. 5 hatch of the FLEETWOOD by reason of the presence of ice or frost on the place where the plaintiff was standing at the moment he fell, that fact would not of itself warrant you in finding that the vessel was unseaworthy. To justify such a conclusion, it must appear that the defendant knew of its presence and had unreasonably failed to remove it, or that it had been there such a length of time that in the exercise of ordinary care the defendant ought to have known of it and removed it, since the defendant is not liable for any transitory condition of such a character."

No. 7A

"If you find that the plaintiff was caused to fall by reason of lack of adequate lighting at the point from which he fell into the forward end of #5 hatch of the FLEETWOOD, that fact would not of itself warrant you in finding that the defendant was negligent. To justify such a conclusion it must appear that the defendant knew of the inadequacy of the lighting at that point, or that it had existed such a length of time that in the exercise of ordinary care the defendant ought to have known of it and remedied it, and had thereafter unreasonably failed to furnish sufficient lighting for the work being performed at the time, since the defendant is not liable for a mere transitory condition of such a character."

No. 7B

"If you find that plaintiff was caused to fall into the #5 hatch of the FLEETWOOD by reason of the presence of ice or frost on the place where the plaintiff was standing at the moment he fell, that fact would not of

itself warrant you in finding that the defendant was negligent. To justify such a conclusion, it must appear that the defendant knew of its presence and had unreasonably failed to remove it, or that it had been there such a length of time that in the exercise of ordinary care the defendant ought to have known of it and removed it, since the defendant is not liable for any transitory condition of such a character."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instructions as follows (400):

"Mr. Waddell: Your Honor, these exceptions are made, I believe, under Rule 51, objections to failure to instruct as requested by counsel for defendant. The specific requested instructions that I refer to are the following, your Honor. Those instructions, and there are a total of four of them, which relate to the transitory nature of the unseaworthiness or the negligent or unsafe condition alleged by plaintiff. Those early instructions which, in effect, say that there is no liability for such a transitory condition."

4. The Court below erred in denying appellant's requested instruction No. 11A, which would have instructed the jury as to the extent of the ship operator's duty to furnish lighting equipment to stevedores. The requested instruction is set out in the printed record at page 32 and is as follows:

No. 11A

"If you find from the evidence that it is the custom for a ship operator to provide such lights as have been described as cargo lights in this case for the use of the stevedoring company in connection with loading operations, and particularly in connection with the work which was being done at the time plaintiff fell into the hold and also that it is the custom for the longshoremen

themselves to place such lights in such location or locations as they may deem proper to perform that work, then you are instructed that any failure on the part of the longshoremen to place the lights so that there was sufficient light to properly perform their work at the place involved does not constitute unseaworthiness of the vessel or negligence on the part of the defendant in this case, the steamship operator."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instruction as follows (401):

"Mr. Waddell: The other failure to instruct to which we object at this time deals with that instruction which places upon the stevedores the sole responsibility for placing of the lights, which are furnished by the vessel, and that any deficiency in lighting which results from the placing of such lights is not the liability of the steamship company."

5. The Court below erred in denying appellant's requested instructions Nos. 21A and 21B which would have submitted to the jury certain issues of contributory negligence. The requested instructions are set out in the printed record at pages 33 and 34 and are as follows:

No. 21A

"You are instructed that if you find that the plaintiff knowingly proceeded into an area which he could see was not sufficiently lighted he is guilty of contributory negligence, the degree of which is to be determined in the light of any circumstances which induced such action on his part."

No. 21B

"You are instructed that if the plaintiff knowingly proceeded into an area which he could see was insuffi-

ciently lighted, he must use such care in so proceeding as a reasonably prudent man would exercise under like conditions and failure so to do would be contributory negligence on the part of plaintiff."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instructions as follows (400, 401):

"Further exception is made to the failure to give two instructions relating to the subject of contributory negligence, and with particular reference to the effect on contributory negligence of the plaintiff intentionally proceeding into an area which he knew to be dark. There are two such instructions."

6. The Court below erred in denying appellant's requested instruction No. 26A which would have submitted to the jury the question of whether the danger of slipping on ice or frost is an inherent risk and hazard of working in and about freeze compartments of refrigerator vessels. The requested instruction is set out in the printed record, page 34, and is as follows:

No. 26A

"You are instructed that there are certain risks and hazards that are inherent in the occupation of working as a longshoreman in or about a freeze hatch on a refrigerator ship, and, if you find from the evidence that one of these is the risk and hazard of slipping on ice or frost that is sometimes found in or about a freeze hatch and that plaintiff's fall resulted solely from his slipping on such ice or frost, then his fall was the result of such inherent risk or hazard, and your verdict must be for defendant."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instruction as follows (401):

"The last failure to instruct which we note at this time is a requested instruction to the effect that the presence of ice or frost in expectable places in the vicinity of a freezer hatch is a risk or hazard inherent in the occupation of a longshoreman working in such a freezer hatch. Those are the instructions. They have already been submitted to your Honor at an earlier time."

7. The Court below erred in denying appellant's request and motion to the Court to instruct the jury to disregard testimony in the record regarding the lights in the ceiling of 'tween deck in determining the unseaworthiness of the vessel or the negligence of defendant for the reason that there was no substantial evidence that any lack of such lights was a proximate cause of the accident. This motion was made orally at the conclusion of the case. The full transcript thereof is as follows (378):

"Mr. Cooper: I want to make this motion for the record. We move the Court to have the jury instructed, or directed, rather, to disregard testimony in determining whether a vessel is unseaworthy or the defendant negligent, in respect to ceiling lights in the hold, for the reason that there is no substantial testimony which would warrant submitting that to the jury, to the effect that such lack of lights, if there were such, was a proximate cause of the accident.

The Court: Well, you are asking the Court to give such an instruction?

Mr. Cooper: Yes.

The Court: All right, I will not give such an instruction."

FULL STATEMENT OF FACTS

The FLEETWOOD is a reefer vessel and frozen cargo was being loaded by West Coast Stevedoring Company into No.

Williams was familiar with reefer vessels, having worked on them before during his fifteen years as a longshoreman on the San Francisco Waterfront. He had climbed down ladder in and out of the hold several times that night using the ladder involved because the hold men only stayed below one half hour. Other members of the hold gang did the same thing an equal number of times.

It is customary practice for a vessel which is coming into port to lay out cargo lights, three or more in number at each hatch, to be used by the stevedoring company in handling cargo. These lights are often plugged in, but if they are not, there are sockets where they can be plugged in. Thereafter, they are used in a manner determined by the stevedoring company to suit their own ideas. Such lights were available at the time the gang went to work 7:00 o'clock in the evening, and were available at the time of the mishap. When No. 5 hatch was opened up at 7:00 o'clock, three cargo lights were lowered by the longshoremen into the hold where the men were working cargo in order to provide sufficient light in the square of the hatch. These were hung at three corners of the hatch, two of them being lowered quite far down, and one of them being secured along the coaming at the inshore forward corner of the hatch. Before the hatch plugs were put in place at about 12:00 o'clock midnight, the cargo lights were of necessity pulled up out of the hold and placed on deck; one, and probably two, on the winch platform which is immediately aft of the hatch. That platform is $8\frac{3}{4}$ inches below the top of the hatch coaming. They were left lighted. If more light was desired by the longshoremen, a light was sometimes held by one of them and directed into the square of the hatch where the men were hooking on. On other occasions, a light was secured to the guard rail on the off-shore side of the hatch where it would not be struck by a

plug being lifted up and swung inshore. The distance from the top level of the plugs to the top guard rail running along the forward part of the hatch in front of the winchdriver is almost 6 feet. The vessel was equipped with the customary flood lights on the king posts some 20 or 25 feet above the deck, but the light from those lights was cut off to a large extent because of the presence of what is commonly known as a Seattle hatch tent. This is a tent usually set over reefer hatches while the hatch is open to prevent, to some extent, warm air coming in contact with the cold air of the hold and thus reducing the temperature of the hold. In order for the cargo runner to move back and forth, such tents have and this one had a slot at the peak. On the offshore side, this slot was a few inches in width, and widened toward the onshore side until it was about two feet wide. The tent was entirely open on the dock side of the ship so that it made an inverted V. There were dock lights along the dock shed where the vessel was docked which furnished a little light to the area. And as indicated there was some light which came through the slot from the flood lights above deck.

The stevedoring company was in complete charge of the method of doing the work, and consequently arranged the cargo booms, the falls and the lights for the doing of their work, and to suit their own ideas.

There was not any evidence of any complaint voiced by any longshoreman that the light conditions, which prevailed, were insufficient or unsafe for the conduct of the work. Williams himself made none and heard none.

In the 'tween deck hold there were what is often described as overhead or ceiling lights. The purpose of these was to furnish light for the longshoremen for stowing in the wings and forward and after portions of the hatch, which were not within or near the square of the hatch; and they were so

used. These were small, about 60 watt, permanent lights installed at 10 foot intervals, 4 on each side of the hatch back in the wings in the ceiling of the 'tween deck. These lights were in a cylindrical solid fixture, the lower edge of which extended beyond the lower part of the electric bulb or globe inside; and, had at the bottom a solid, heavy piece of colored glass over which there were cross bars of iron. See Ex. A. The purpose, and use to which they were put, was to furnish light to facilitate the work of longshoremen working in the wings and forward and after portions of the hatch. There is some testimony that these lights were not on. And there is some testimony that they were usually turned off when the plugs were put on and the blowers to circulate cold air in the holds put on; and, that they were turned on again when the blowers were turned off when the longshoremen again went into the hold to resume work. At the time of the mishap, none of the longshoremen had returned to the hold, and consequently no work of stowing cargo had commenced.

Plaintiff sought to have the inference drawn that if these lights had been on, if in fact they were not, there would have been enough light thrown upward through the small space created by the removal of the key plug to have indicated the condition of the hatch coaming on which they contended plaintiff slipped; and as to the condition of the coaming plaintiff sought to prove that when the key plug was lifted out, the cold air caused moisture or frost or both to form on some part of the coaming and plaintiff to slip and fall.

ARGUMENT

I.

The Evidence Was Insufficient to Warrant Submission of the Case to the Jury on the Points Which Plaintiff Had the Burden of Proving in Order to Make Out a Case, and the Trial Court Erred in Failing to Grant Defendant's Motion for a Directed Verdict at the Close of the Case and for the Same Reason Committed Error in Denying Defendant's Motion to Enter Judgment for Defendant Notwithstanding the Verdict.

The rule in respect to sufficiency of evidence established by the Supreme Court of the United States and recognized by this Court in the case of *Butte Copper & Zinc Co. v. Amerman, et al.*, 157 F.2d 457 (9th Cir. 1946), is that there must be substantial relevant evidence to support the verdict. And, substantial evidence is defined by the Supreme Court in the case of *Edison Co. v. Labor Board*, 305 U.S. 197, 229, 83 L.Ed. 126 (1938), as follows:

"Substantial evidence is more than a mere scintilla, it means *such relevant evidence as a reasonable mind might accept as adequate* to support a conclusion."*

There was not such relevant evidence in this case.

A. The Evidence Shows That Plaintiff Slipped When He Had One Foot On the Hatch Coaming and Was Stepping Down With the Other to Go Down the Ladder Leading Into No. 5 Hatch.

It is essential at the outset that it be determined where Williams was when he stepped back and commenced to fall, because without that it would not be possible to determine whether there was sufficient light to make the place reasonably safe or whether there was any moisture or frost which had been, or could have been, deposited at such place.

No one saw Williams when he started to fall. Consequently the only direct testimony as to where he was when

*Emphasis added throughout the brief unless otherwise indicated.

the fall commenced is that given by Williams himself. The pertinent parts of his testimony are as follows:

"Q. You mean, then, before it [key plug] was lifted out, you climbed up this ladder, you call it?

A. Sure.

Q. And then went—

A. Walked around.

Q. I see. Climbed up the ladder and walked around?

A. Sure.

Q. And then the winchdriver lifted the plug out, is that right?

A. Sure.

Q. Actually where did you go? You said you walked around; tell us where you went?

A. To my remembrance, I think I went on the off-shore side.

Q. You think you went to the offshore side?

A. I think, I'm almost sure I did, because the plugs go on the inshore side." (70)

* * * * *

"Q. Mr. Williams, you said a moment ago that you had gone out of the hatch up on deck after you helped hook up the plug?

A. That's right.

Q. What did you do after that?

A. *That is my last remembrance, is when I started back down to hook up the next plug.* When I fell through there, of course, I was unconscious four or five days; the rest of that I really don't remember." (43)

* * * * *

"Q. Did you use the ladder to go out?

A. Sure.

Q. Used the ladder to go out. And then is this correct, then, that after the winchdriver had removed the plug and swung it out of the way, then you started to climb back?

A. Yes." (58)

"Q. This is the rail you are talking about, you started over that rail?

A. Yes, over this one.

Q. You mean the second rail?

A. Over the top rail, the one upon the top.

Q. Well, the one that isn't shown in No. 2?

A. Yes, that's right.

Q. And this is the one you are talking about, which is shown in—I mean, shown in No. 3, which is shown in No. 2, is that correct?

A. That's correct.

Q. So you started over that?

A. Sure.

Q. And then something happened?

A. Sure.

Q. And that's all you remember, is that correct?

A. And I come over, my foots, *I stepped down*, I remember slipping. The rest of it I don't remember no more. (59)

* * * * *

Q. That is the way you did. Which is the hatch coaming which—which has been marked on defendant's Exhibit No. 2 as "Coaming"—that is where you walked along, right along here, is that right?

A. Sure.

Q. Right along. *Except you walked from offshore toward the inshore side, until you got to the ladder, is that right?*

A. Sure." (71)

Because of the wide variance between the testimony given by Williams at the trial and that given by deposition taken December 8, 1953, certain portions of his deposition were read. However, Williams was consistent at all times as to the point he had reached at the time he slipped and fell.

The following testimony in the deposition was read by counsel for the appellant:

“Q. Now you say at the time you fell, you had one foot on this, what do you call it?

A. On that, yes, on the coaming.

Q. On the coaming?

A. Yes, sir.

Q. I see. And the other foot was where?

A. Getting off, where I was getting off, just like (indicating)—

Q. You stepped back with the other foot, is that right?

A. You have to step back.” (253)

The testimony set forth below was read by counsel for appellee:

“Q. I see. Now correct me if I am wrong. Your foot was somewhere along this hatch coaming (indicating)?

A. Yes, sir.

* * * * *

[Q.] And at that moment you fell?

A. Sure.

Q. And at that time you had your back toward the hatch?

A. That is the only way to get off.” (255)

That the fall of Williams started high up is corroborated to some extent by the testimony of Ray Stewart, another longshoreman, who, with his partner, had just unhocked the key plug after it had been landed on the deck of the vessel on the inshore side of the No. 5 hatch. He was not looking in the direction of the hatch but heard someone holler and upon looking around saw a dark object fall in the hatch, which he indicated was in the vicinity of where the long bars are in the ladder leading into No. 5 hold. (See photograph, Plaintiff's Exhibit 6F) His reference, of course, could only be to bars in the ladder. His testimony was in part as follows:

“Q. (By Mr. Cooper): So then you have located it for us as near as you can where you saw the dark object falling, right here, is that correct?”

A. Yes, somewhere in that vicinity.

Q. Where you have this bar, where these bars are indicated, which are really steps on the ladder, aren't they?

A. Yes, these are steps.” (90)

There is not any other evidence in the case bearing on this point. There can be no doubt therefore that one of Williams' feet was on the top of the hatch coaming and there is no indication his other foot had reached even the top rung of the ladder.

B. There Was Not Sufficient Testimony to Meet the Requirements of the Rule That the Light On the Hatch Coaming Was So Dim as to Render the Place Unsafe.

Under the well established rule in Maritime law, the place of work need only be reasonably safe. Therefore, if it is reasonably safe, it is not unsafe within the meaning of the law.

There is not any direct testimony to the effect that the light was insufficient where Williams was when he started to step back, i.e., on top of the coaming; only that it was dim down on top of the plugs. But there is testimony that the longshoremen had placed at least one light on the winchdriver's platform, which is described in the record as a 300 Watt Mogul-base lamp which did throw light on the forward section of the hatch coaming. That testimony was given by William J. Wines, the winchdriver. He was standing within about a foot of the place where Williams slipped. His testimony is as follows:

“Q. [By Mr. Cooper]: When you came back that night at 1 o'clock, who placed the lights for the hatch that night?”

"A. They were sitting there on deck, yes, since we come back from dinner." (314)

"Q. I see. And one of them was placed so we could see—

[Oh, this is continuing the answer.*]

And one of them was placed so we could see to put on the plugs, although I admit it was a little dim. It wasn't really shining down on the plugs, *it was shining over the hatch*. The hatch coaming is about 18 inches off the plugs.

Q. (By Mr. Cooper): That was your testimony, was it?

A. Yes, sir." (315)

* * * * *

That lights so placed would have such an effect in lighting the area is corroborated by chief mate Wishard in testifying as follows:

"Q. Yes. Now, and then you started to tell us that sometimes they put them on the rim. Now is that what you meant, on the rim?

A. That's what I mean.

Q. And when that happens, what effect does it have on the lighting of the plugs?

A. It would throw your light *over the top of the hatch coaming* and light up that area." (164)

The general inference that the light conditions were adequate may be drawn from the fact that no evidence was introduced to show that any longshoremen, including Williams, had complained of insufficiency of light. Mr. Williams testified (74) that he had made no complaint and heard none. Mr. Walsh, the longshore gang boss, testified (275) that he heard no complaint, and the same testimony was given by Mr. Wines, the winchdriver (322). Also, we

*Remark by counsel.

think it is of considerable significance in that connection that Mr. Kjellmann, who was acting as night mate on the night in question, testified as follows:

“Q. I see. So do I understand from that, then, that it's left up to the longshoremen as to whether they have got enough lights or whether they haven't? Is that correct?

A. That's their—yes, that's their lookout. If they ain't enough lights, they holler. They holler for more.”
(125)

Testimony of the plaintiff and that given by plaintiff's witnesses was directed to the point that there was not sufficient light at the top level of the plugs where plaintiff *had* been working. Even if it be admitted that there was enough evidence to warrant a finding by jury that the light was inadequate at that place, it would not be proof that there was insufficient light at the *top* of the hatch coaming approximately 2 feet 9 inches above (241).

C. There Is a Complete Failure of Testimony to Show That Moisture or Frost Was or Could Have Been Deposited at Any Point On the Hatch Coaming Above the Level of the Hatch Plugs, Much Less On Top of the Hatch Coaming Where Williams Slipped.

The relevant temperatures at the time of the mishap are undisputed. The temperature in the freeze hold, which is the space below the plugs, was 10 to 12 degrees Fahrenheit. The temperature in the air above the hatch was approximately 50 degrees.

There were experts called by each side who were in agreement that air is a very poor conductor of heat and that consequently heat would be transferred from one body of air to another or to any other body very slowly. The time within which the cold air from the freeze hatch had contact with the warmer air above, before Williams fell, was very short—

probably not more than a minute, and perhaps less. The time involved was only that necessary for the winchdriver to lift the plug out of position, swing it to the inshore side of the vessel, from ten to twenty feet away, where it was unhooked by two men and return it to a position more or less above the hatch.

It is a well-known physical phenomenon that moisture will be deposited on the surface of a cold object only when the temperature of warmer moisture-laden air is reduced to the dew point at the point of contact.

The part of the coaming which is involved in this case was above the level of the plugs and, of course, much warmer than the cold air in the freeze hold immediately below by some 40°. The physical factor necessary to produce moisture on the coaming and more particularly on the steps of the ladder was therefore lacking. Mr. Hotchkiss, plaintiff's expert, admitted the premise but drew the wrong conclusion (199).

Mr. Goedewaggen, who was called by defendant, made tests in No. 5 hatch on the FLEETWOOD under conditions of temperature substantially the same as those existing on the night of the accident, which showed the following:

The temperatures on the main deck of the vessel at five minutes after 1:00 A.M., two thermometers being used, were 56 and 57 degrees. They were then placed at approximately the level of the plugs and 15 minutes later they both read 48 degrees Fahrenheit. The key plug was then removed and the blowers put on; 18 minutes later the temperatures were 44½ and 45 degrees. The blowers were then turned off for a period of 15 minutes and the temperature raised to 47 degrees.

Thus, at no time, irrespective of whether the blowers within the hold were on or off, was there any substantial change in temperature, and at no time did the temperature

at the plug level fall below $44\frac{1}{2}$ degrees (327, 328 and 329).

This data shows beyond any doubt whatsoever that there was no substantial cooling at or on the face of the hatch coaming over a period of 18 to 20 minutes because of contact with air coming out of the freeze hatch. It was not a case of warm air coming in contact with a cold body, but the reverse. There would, therefore, be no physical reason for claiming that any moisture would be deposited on the coaming or on the ladder or steps and no basis whatsoever for contending that there was any moisture deposited much less frost created on the hatch coaming, or more important, the rungs of the ladder which plaintiff might have stepped on.

D. There Was No Testimony Whatsoever to Show That If the So-Called Ceiling Lights Had Been On They Would Have Furnished Any Light Where Plaintiff Slipped or Even Any Light On the Steps of the Ladder Above the Plugs.

Mr. Goedewaggen, as already indicated, went on board the vessel and took temperatures. He also experimented with the ceiling lights on and off as to light conditions. His testimony was that there was no noticeable difference in the amount of light whether the ceiling lights were on or off. His testimony is as follows (331):

“Q. (By Mr. Waddell): Mr. Goedewaggen, let me ask you this question, then. At the time that you were observing, as you testified, this area here and at the moment that the lights in the 'tween deck and lower hold were turned off, did you notice any difference whatsoever in the appearance of this area?

A. No, I did not.”

There is no contrary testimony in the record, i.e., that there was any observable difference as to the light in the square of the hatch at the plug level when the ceiling lights

were off as compared to when they were on. All the testimony produced by plaintiff did no more than raise a possible inference that if the ceiling lights had been on there would have been some light reflected upward and through the relatively small opening created by removal of the key plug. As already stated in this brief, the lights in question were very small, 60 watts, and as the testimony shows, there was only one light on each side more or less directly opposite the aperture created by the removal of the key plug. They were located a distance of several feet back under the wings, and because of the cylinder in which these lights were located, the light given off from them was directed almost straight down towards the floor of the hold. Furthermore, they were covered with heavy glass and metal bars, which would reduce the amount of light thrown by these small bulbs. Finally, any light which could possibly come out of the hold would not throw any light on the top of the coaming where it appears Williams was standing; or on any of the bars on which he would step in descending to the top level of plugs. All these bars which the longshoremen stepped on and held onto to go down into and to come out of the hold were recessed so that any small light from the hold would not light the top of these bars even if Williams could see them in descending. And, the light would be in Williams' eyes had he looked down. A person rarely, if ever, looks at his feet when descending a ladder, because he is facing the ladder in descending. And even if Williams had looked, he would not have been able to see the bars because of the already stated fact that they were recessed. Furthermore, Williams gave no testimony that he did look.

II.

The Argument Under the Points Above Shows That, for Reasons Almost Entirely Factual, the Court Should Have Entered Judgment for Defendant. It Will Now Be Shown That Under Principles of Established Law as Applied to Uncontradicted Evidence, There Was No Basis for a Finding of Unseaworthiness of Vessel or Negligent Failure of Defendant to Furnish Plaintiff a Safe Place In Which to Work.

1. THE FURNISHING BY THE SHIP OPERATOR OF AN ADEQUATE NUMBER OF LIGHTS IN GOOD CONDITION AND THE POWER TO OPERATE THEM FULFILLS ITS DUTY TO A LONGSHOREMAN RESPECTING ILLUMINATION.

Even if there were enough evidence to justify an inference by the jury that Williams fell as a result of a lack of illumination at the point from which he fell, there can be no liability on the part of this appellant because the uncontradicted evidence shows that all necessary equipment and electrical power to adequately light the area was furnished by it to the longshoremen.

It should be first pointed out that there was no evidence introduced to prove, and plaintiff did not contend, that there was any structural or similar defective condition of the vessel in or about hold No. 5. The contention made is that there was insufficient light at the time of the accident and that this factor proximately contributed to Williams' fall.

The evidence is uncontradicted that the defendant provided at least three large cargo lights for the use of longshoremen in lighting the area in and about No. 5 hatch. These were 300 Watt Mogul-base lights with reflectors. They were affixed to long insulated electric light cords, and there were sockets into which they could be plugged in the vicinity of No. 5 hatch. There is also uncontradicted testimony that it was the custom for the stevedore company, acting through their longshoremen, to place such lights to suit their own ideas as to necessity, as well as to spot the booms, arrange cargo falls, etc. (Wishard 166 and 169, Walsh 260, Kjell-

mann 125). And, as the statement of fact earlier set out shows, the longshoremen had used these lights to light the square of the hatch and also to furnish light lower down in the hold where cargo was being stowed. When the gang knocked off for the midnight recess, these cargo lights were hauled up out of the hold by longshoremen and placed in the vicinity of the hatch. At least one (and probably two) was placed on the winch platform, which is forward of the hatch; and all were left lighted, i.e. they were not unplugged. Further, there is uncontradicted testimony that where the reefer plugs are being put on or taken off and more light is needed in the hatch area to facilitate that work, they are either held by longshoremen and light directed down on to the plugs or affixed to the guardrails forward of the hatch on the offshore side for the same purpose. The testimony of chief mate Wishard in this respect is as follows (158 ff):

“Q. No, the question I asked you was, were they [lights] available for lighting the plugs if deemed necessary by the longshoremen?

A. Yes.

Q. Are they ever used in lighting the plugs at the time you commence removing the plugs by the longshoremen?

A. They are.

Q. Will you tell us the different methods that are used in using, I mean, are adopted in using those floodlights to light the top of the plugs when men are removing them?

* * * * *

A. All right. I have seen them sit flat on the winch platform, I have seen one longshoreman hold the light to throw the light on the plug, I have seen them turned on their rim and I have seen them—— (159)

* * * * *

“Q. Yes. Now, and then you started to tell us that sometimes they put them on the rim. Now is that what you meant, on the rim?

A. That's what I mean.

Q. And when that happens, what effect does it have on the lighting of the plugs?

A. It would throw your light over the top of the hatch coaming and light up that area.

Q. You are referring, then, to the occasion when it's on the winch platform?

A. Yes." (164)

* * * * *

"Q. I see. Did you ever see any of them use, handle the lights by hand?

A. Well, I think I already answered that question. I said that I have seen them hold them in their hands and shine the light down." (166)

Mr. Walsh, the gang boss testified as follows (272):

"Q. And will you tell us whether they are there-after* ever used for the lighting of the hatch in the plugs when you are removing plugs?

A. Yes, they use them. Generally one fellow holds them or hangs them up.

Q. I see. Hangs them up. Where do you mean, on the railing or— —

* * * * *

A. One fellow would hold them here on the starboard side. That's out of the way of the plugs.

Q. That's out of the way of the plugs? Well, assume you hung them on the rail and didn't hold them; where would you put them?

A. On the starboard side.

Q. I see. Is that the offshore side?

A. Offshore side. See, the plugs go in— —" (273)

The testimony of Ray Stewart, a member of the longshore gang, is as follows:

"Q. That is called the winch platform. Sometimes you put the cargo light there, is that right?

A. Sometimes we do.

*After the cargo lights are pulled out of the hold and put on deck.

Q. Yes. And sometimes you hang it on the rail, isn't that right?

A. Yes." (98)

As indicated earlier in this brief, Williams, gang boss Walsh, and winchdriver Wines all testified without contradiction that no complaint was made about lighting. Nor was any demand for additional lights made. In any event, there can be no question but that one cargo light because of its size and design was amply sufficient to illuminate the top of the plugs and the square of the hatch. That a light could have been so used is proven by the fact that immediately after the mishap occurred a longshoreman picked up a light and shone it down in the hold where Williams had fallen.

Under these circumstances the recent holding of the Court of Appeals for the First Circuit in *O'Leary v. United States Line Company*, 215 Fed. 2d 708 (1st Cir. 1954) 1954 A.M.C. 1772, is strikingly in point. There the Court said (page 712) in affirming a judgment entered on a directed verdict for the defendant:

"The hold was dangerous only because it was dark, and certainly there was nothing hidden about that danger. Thus any finding of the defendant's negligence must be predicated on a duty to light. But, under the arrangement with the master stevedore, and in accordance with the practice generally followed, the ship's duty was only to provide an adequate number of suitable lights, and the electric power to operate them (and, perhaps, to connect them), while it was the master stevedore's duty to request such lights as he thought were required and to place them where he thought they were needed. On the evidence it could not be found that the shipowner failed in the performance of its duty. That is to say, there is no evidence that suitable lights were not available on the ship in adequate quantity, or

that the lights supplied were defective, or that current was not continuously available to operate them."

The *O'Leary* case, *supra*, is the latest of a number of cases on the subject of the shipowner's duty with respect to furnishing lighting for longshoremen, all of which have stated or implied that the shipowner's obligation with respect to lighting is discharged when he furnishes to the longshoremen an adequate number of suitable lights and a supply of electric power to operate them.

The following cases recognize this rule:

Riley Admr. v. Agwilines, Inc., 290 N.Y. 402, 72 N.E. 2d 718 (1947), 1947 A.M.C. 1038;

Long v. Silver Line, 48 F.2d 151 (2d Cir. 1931), 1931 A.M.C. 991;

The Hindustan, 37 F.2d 932. (E.D. N.Y. 1930), 1930 A.M.C. 340, Aff'd per curiam 44 F.2d 1015 (2nd Cir. 1930), 1931 A.M.C. 270;

Goldberg v. United States, 91 F. Supp. 104 (E.D. N.Y. 1950), 1950 A.M.C. 1226;

In *Brabazon v. Belships Co.*, 202 F.2d 904, 909 (3d Cir. 1953), 1953 A.M.C. 737, the court set forth the question of shipowner's liability to an injured longshoreman for alleged failure to provide illumination in the following terms:

"If the ship did not have an adequate supply of such appliances in proper working order, this deficiency might well constitute unseaworthiness. * * * And omission to supply lights as requested by the contractor might well be actionable failure to make the place of working reasonably safe."

The court then determined that the shipowner was liable because there was evidence that the ship was requested from time to time on the evening of the accident to supply additional lights but failed to do so. The evidence is to the contrary in our case.

And in *Riley Admr. v. Agwilines, Inc.* (supra) the court described the shipowners duty to provide illumination as follows (1947 A.M.C. 1042):

“The ship was equipped with ample facilities for supplying completely adequate light, and there were available to the longshoremen lights which could be and were let down on long cables to light the places where the men were working on the 'tween deck. These facts are not in dispute. The maritime law imposes no liability upon the vessel or its owner when a longshoreman employed in loading or discharging the vessel is injured because of the manner in which the longshoremen carry on the work or because of their failure to use appliances furnished for their use, including lights available for lighting the 'tween decks or other parts of the ship where the work is done. * * * The vessel must be seaworthy; its equipment and tackle and machinery must be in order, and if there be defects in such gear resulting in personal injuries the operator of the ship will be liable, not only to the members of the crew, but to stevedores as well (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 AMC 698). There were no such defects in this case, and the lights were at hand. They were tools furnished for use in the safe conduct of the work, and if not used the negligence was not that of the ship or its owner.”

Judgment for plaintiff was reversed.

These cases dealing with the shipowner's duty to furnish adequate lighting equipment are similar to the large number of cases standing for the general proposition that where the ship operator has furnished adequate equipment and devices

for the safety of seamen it has discharged its duty to furnish a seaworthy vessel or a safe place to work, even though the seamen fail to utilize such devices and equipment. See, e.g., *Shields v. United States*, 175 F.2d 743 (3d Cir. 1949), 1949 A.M.C. 1355, *certiorari denied* 333 U.S. 899 (1949); *Larsson v. Coastwise (Pacific Far East) Line*, 181 F.2d 6 (9th Cir.), 1950 A.M.C. 769, *certiorari denied*, 340 U.S. 833 (1950); *Nelson v. United Fruit Co.*, 201 F.2d 47 (2nd Cir. 1952), 1953 A.M.C. 146; *Lieflander v. State Steamship Co.*, 149 Ore. 605, 42 P.2d 156 (1935), 1935 A.M.C. 559.

2. THE LIGHTS IN THE CEILING OF THE 'TWEEN DECK HOLD WERE NOT INTENDED OR USED FOR THE PURPOSE OF LIGHTING THE HATCH COAMING AREA. IF, THEREFORE, THEY IN FACT WERE NOT ON, THAT DOES NOT RENDER THE VESSEL UNSEAWORTHY.

The uncontradicted testimony is that the lights in the fixtures built into the ceiling of the 'tween decks were intended solely for use in lighting the hold to facilitate the stowing of cargo in the wings and in the forward and after sections, i.e., those parts of the hold which could not be adequately lighted by lowering the cargo lights into the hatch from above, and there is no evidence they were used for the purpose of lighting the hatch above the plug level. There is therefore no basis for any contention that the ship owner should have had them on, assuming that they were not on.

Mr. Kjellmann, who was an old ship's master, and was acting as night mate at the time testified in this regard as follows:

"Q. (By Mr. Chandler): The lights I am referring to, I am sorry, the lights I am referring to are the lights down in the holds, these lights we have been talking about.

A. There are lights down in the hold. *They don't need them until they get the hatch off, and come down*

to go to work. They wouldn't help them a bit to take the hatches off." (120)

* * * * *

"Q. (By Mr. Chandler): Have you observed, have you ever observed the lights down in the holds here providing light up on these steps when the key plug is removed?

A. No, I can't say that I have seen that, no, whether they shine up there or not, I don't—wouldn't be able to say that. I don't—I don't see how—they can't shine up too much anyhow." (121)

Mr. Wishard, the first mate, also testified to that effect:

"Q. What's the purpose of it, what's it used for?

A. Well, when they are stowing the cargo, it puts light down from the overhead, down on the deck, so that they can see.

Q. What part of the deck?

A. The gratings, in the wings.

Q. Yes. Well, I mean, does it put the light on the wings or in the center of the hatch or where?

A. In the wings." (177)

Chief engineer Maple testified as follows:

"A. That is the overhead fixture.

Q. I see. And the light is inside of this? I am showing you Defendant's Exhibit—is it marked?

The Clerk: It was marked 11. I will remark it.

Q. (By Mr. Cooper): That's the type of light. Will you tell us, if you know, what those lights were used for?"

"A. For lighting of the hold around the wings of the hatch.

Q. I see. Now, on what occasion?

A. While loading or discharging cargo." (351)

Mr. Walsh, the longshore gang boss, testified as follows:

"Q. Now, what are those lights that are in the

ceiling, in the wings of the ship, used for?

A. Well, they are deck lights to see underneath.

Q. I mean, they are used in connection with what work?

A. Stowing cargo." (274)

Unseaworthiness has been defined in the leading modern case on that subject, *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1943), as "inadequate for the purpose for which * * * ordinarily used."

See *Norris, The Law of Seamen*, Section 613.

In applying this concept of seaworthiness, this court has ruled that a beam across a hatch from which a seaman had fallen was not unseaworthy in not furnishing a safe footing where the beam "was not intended as a place to work." *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Cir. 1930), 1930 A.M.C. 1390. And in *Holub v. Sword Line*, 132 F.2d 206 (5th Cir. 1942), 1943 A.M.C. 898, the court held that a cargo batten on which libelant was climbing was not unseaworthy when the rusty cleat holding it in place broke, since cargo battens were not intended to be used for climbing upon.

As has been shown earlier in this brief, there is no evidence in the record that the overhead lights in the 'tween decks, which certain witnesses testified were not burning at the time appellee fell, would have cast any effective light on the place from which he fell. But even if the jury were to be permitted to infer that some such illumination might have been cast on that area by those lights, the fact that such lights were not burning does not constitute an unseaworthiness because there is no evidence that those lights were intended or ever used for the purpose of lighting the area from which appellee fell.

To hold that a vessel can be unseaworthy because an appliance does not function properly for a purpose for which it was not intended to be used, would be a strange rule and without precedent. It would be just as sound to argue that the shipowner should be liable for injuries suffered by a person walking in a darkened deck area because a light, which when the Captain read at night usually shone through a porthole in his cabin and lighted the area to some extent, was not on at the time of the injury. The obvious answer to such an absurd contention is that the Captain's reading light is not intended or ordinarily used for the purpose of lighting the deck outside his porthole.

The Court, therefore, should at least have instructed the jury to disregard all testimony regarding the ceiling lights.

3. ANY INSUFFICIENCY OF LIGHTING AT THE PLACE FROM WHICH APPELLEE FELL IS, IN ANY EVENT, A "TRANSITORY" CONDITION WHOSE EXISTENCE DOES NOT CONSTITUTE AN UNSEAWORTHINESS OR A BASIS FOR A FINDING OF NEGLIGENCE.

Even if it be assumed that the illumination at the point from which Williams fell was inadequate for any reason, the evidence shows that insofar as the work involved was concerned that condition existed for an exceedingly short period of time—almost momentary. It was not of any importance until longshoremen began to remove the hatch plugs, and it affirmatively appears that the dim light condition could not have existed for more than about two minutes of working time requiring more light. There were several hatches on the vessel being worked and no one representing the ship was near this hatch.

The condition was transitory in the extreme and under an impressive line of modern authority a vessel owner is not liable, either under the theory of negligence or that of unseaworthiness, for injuries resulting from such transitory conditions.

Cookingham v. United States, 184 F.2d 213 (3d Cir.), 1950 A.M.C. 1793, *cert. denied*, 340 U.S. 935 (1950);

Shannon v. Union Barge Lines, 194 F.2d 584 (3d Cir.) 1952 A.M.C. 686, *cert. denied* U.S. 846 (1952);

Adamowski v. Gulf Oil Co., 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, *affirming* 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079; *cert. denied* 343 U.S. 906 (1952);

Boyce v. Seas Shipping Co., 152 F.2d 658 (2d Cir. 1945), 1946 A.M.C. 45;

Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D. N.Y. 1954), 1954 A.M.C. 806;

Hawn v. Pope & Talbot, Inc., 99 F. Supp. 226 (E.D. Pa. 1951), 1951 A.M.C., *modified on other grounds* 198 F.2d 800 (3d Cir. 1952), 1952 A.M.C. 1708, *as modified, aff'd* 346 U.S. 406 (1953), 1954 A.M.C. 1;

Holliday v. Pacific-Atlantic S.S. Co., 99 F. Supp. 173 (D. Del. 1951), *rev'd on other grounds* 197 F.2d 610 (3d Cir. 1952), *cert. denied* 345 U.S. 922 (1953);

Stolper v. U. S. A. (E.D. Pa. 1950), 1950 A.M.C. 551;

Pietryzk v. Dollar Steamship Lines, 31 Cal. App. 2d 584, 88 P.2d 783 (1939), 1939 A.M.C. 1281;

Gladstone v. Matson Navigation Co., 124 Cal. App. 2d 493, 269 P.2d 132 (1954), 1954 A.M.C. 1004;

Blodow v. Pan-Pacific Fisheries, Inc., 128 Cal. App. 2d 428, 275 P.2d 795 (1954).

The majority of these cases have dealt with the presence of foreign substances on deck or passageway. It is difficult to conceive, however, of a condition more appropriately described as "transitory" than one having to do with light; and, the courts have had occasion to apply the rule to cases of claimed insufficiencies of lighting.

In *Adamowski v. Gulf Oil Co.*, *supra*, the Court of Appeals for the Third Circuit affirmed the granting of defendant's motion for judgment notwithstanding the verdict on the grounds that the alleged foreign substance and lack of light in the passageway in which plaintiff was injured was not shown to be other than transitory. See, also, *Hawn v. Pope & Talbot, Inc.*, *supra*, and *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953), 1953 A.M.C. 1799.

The principle of the *Cookingham* case, *supra*, has been applied in the Northern District of California (*Garrison v. United States*, 121 F. Supp. 617 (N.D. Calif. 1954), 1954 A.M.C. 697) and the case has been cited with approval by the Court of Appeals for the 9th Circuit (*Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562, (9th Cir. 1955), 1955 A.M.C. 649).

III.

The Court Below Erred In Refusing to Give Instructions Nos. 4A, 4B, 7A and 7B Dealing with the Subject of "Transitory" Conditions as Requested by Appellee.

The requested instructions are set forth in full at pages 6 to 8 of this brief. The failure to give such instructions was plainly prejudicial error, since without them a jury could conclude that any insufficiency of lighting or any wet or frosty condition on or about the hatch coaming could create an unseaworthiness or a basis for a holding of negligence in failing to furnish a safe place to work. Under the cases cited in paragraph 3 of the preceding section of this brief such a conclusion would be contrary to law.

In *Gladstone v. Matson Navigation Co.*, *supra*, a judgment for the plaintiff was reversed because of the failure to give instructions almost identical to those requested by appellee in this case.

In *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948) 1948 A.M.C. 724, *cert. denied* 335 U.S. 843 (1948), Judge Learned Hand reversed a judgment for the libelant and remanded the case to the District Court for a specific finding on the issue of how long a patch of grease had remained on the deck prior to libelant's injury.

IV.

The Court Below Erred In Refusing to Give Instruction No. 11A Dealing with the Ship Operator's Obligation to Furnish Lights

The requested instruction is set forth in full at pages 8 and 9 of this brief. The failure to give the requested instruction was prejudicial error since, in the absence thereof, a jury might conclude that the ship operator had a continuing duty to furnish illumination as needed by the longshoremen during the conduct of their various tasks. Under the cases cited in paragraph 1 of the preceding section of this brief such a conclusion would be contrary to law.

In *O'Leary v. United States Line Co.*, *supra*, the Court held that where the evidence showed a ship operator to have furnished adequate lights and electric power to operate them a verdict for defendant was properly directed.

V.

The Court Below Erred In Refusing to Give Instructions Nos. 21A and 21B Dealing with the Subject of Contributory Negligence as Requested by Appellee.

The requested instructions are set forth in full at pages 9 and 10 of this brief. Since the appellee admittedly proceeded into an area which he claims was insufficiently lighted, and since the cause and extent of the claimed insufficiency of lighting is the heart of appellee's case, the jury should not have been left with a mere general instruction on the subject of contributory negligence. The authorities

which have considered the question are in agreement that, unless caused by unusual circumstances, proceeding into a darkened area constitutes contributory negligence in some degree and requires the person so proceeding to use such care as the circumstances require. *Read v. United States*, 201 F.2d 758 (3d Cir. 1953), 1953 A.M.C. 314, and *Dervishoglu v. Boyazides*, 44 F. Supp. 385 (E.D. N.Y. 1942), 1942 A.M.C. 556.

VI.

The Court Below Erred In Refusing to Give Instruction No. 26A Dealing with the Subject of Inherent Risks and Hazards of Plaintiff's Employment as Requested by Appellee.

The requested instruction is set forth in full on page 10 of this brief. The failure to give such instruction constituted prejudicial error since, without it, a jury could conclude that there are, in law, no risks and hazards of working in and about freezer compartments on ships which, in the absence of other circumstances of negligence or unseaworthiness, are inherent in the task and which are assumed by the employe. The courts, however, have held that there are such risks and hazards applicable to suits by seamen for personal injuries. *Lake v. Standard Fruit & Steamship Co.*, 185 F.2d 354 (2d Cir. 1950), 1951 A.M.C. 71 and *The Cricket*, 71 F.2d 61 (9th Cir. 1934), 1934 A.M.C. 1035. There is more reason, if necessary, for applying the rule to longshoremen who are really shore workers.

It seems more likely that if plaintiff's fall was due to anything other than his own negligence, that it was caused by an inherent risk or hazard connected with the work, and the court should have given this instruction to the jury. It was necessary for all the longshoremen, including Williams, to climb in and out of the freeze hold a number of times

during the evening (the gang was changed every half hour). In doing so they necessarily came out of an area which was frozen tight into one many degrees above freezing, the lower half of the ladder being in the freeze hold and the upper half being above the plugs.

And Williams was not only thoroughly familiar with conditions on the FLEETWOOD, but with those on other reefer vessels where he had worked. Further, in the few minutes preceding the mishap, he had been down the ladder and up again, which involved using the top of the hatch coaming where he later slipped. Irrespective of whether there was any moisture at the time in question, there surely must have been times when the men came out of the freeze hatch, some of the rungs of the ladder would become moist from the soles of their shoes.

VII.

The Court Below Erred In Denying Appellant's Request and Motion to Instruct the Jury to Disregard Testimony In the Record Regarding the Lights In the Ceiling of the 'Tween Deck.

The full transcript of appellant's motion is set forth at page 11 of this brief. The failure to grant the motion and instruct the jury accordingly was prejudicial error, since it permitted the jury to infer that such evidence was relevant and material and that the alleged fact that such lights were not on at the time of the mishap could be a basis for a finding of unseaworthiness on the part of appellant or a negligent failure to furnish a safe place to work. These issues have been discussed in other portions of this brief and only a brief summary of the objectionable character of such evidence will be given here.

Evidence relating to the overhead or ceiling lights in the 'tween deck was irrelevant because appellee had failed to

establish by the required quantum of evidence that these lights would have had any effect in illuminating the place from which plaintiff fell. The evidence requested to be stricken is irrelevant because the record shows without contradiction that adequate cargo lights and the power to operate them were furnished by appellant. The evidence requested to be stricken is irrelevant because it affirmatively appears in the record that those lights were not intended or used for the purpose of lighting the area from which plaintiff fell and thus their not being on cannot constitute an unseaworthiness. And, finally, the evidence requested to be stricken is irrelevant because any lack of illumination at the place from which plaintiff fell which might have resulted from those lights being off at the moment when plaintiff fell was a transitory condition for which appellant is not liable under the authorities cited above.

CONCLUSION

For the reasons shown, the judgment should be reversed. But if this Court rules otherwise, a new trial should be ordered because of prejudicial errors committed by the trial court. And, in the latter event, it is earnestly requested that this Court indicate for the trial court's guidance that the evidence in regard to the overhead or ceiling lights should not have been received.

Respectfully submitted,

JAY T COOPER

GEORGE L. WADDELL

DORR, COOPER & HAYS

Attorneys for Appellant

(Exhibits follow)



Plaintiff's Exhibit 6





VI Interior's Exhibit E-F



No. 14,706

IN THE

United States Court of Appeals
For the Ninth Circuit

PACIFIC FAR EAST LINES, INC., a corporation,

Appellant,

VS.

JOHN WILLIAMS,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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No. 14,706

IN THE

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For the Ninth Circuit

PACIFIC FAR EAST LINES, INC., a corporation,

Appellant,

VS.

JOHN WILLIAMS,

Appellee.

BRIEF FOR APPELLEE.

FACTS.

John Williams, a longshoreman, was employed by West Coast Terminals, a stevedoring company. The West Coast Terminals, by agreement with Pacific Far East Lines, Inc., a corporation, furnished longshoremen to load the S.S. FLEETWOOD a refrigerator ship. Among the longshoremen who went to work on the S.S. FLEETWOOD was the appellee.

At a few minutes before midnight the longshoremen replaced the five insulation plugs in the No. 5 hatch prior to leaving for their midnight lunch. As soon as this had been done it became the duty of the reefer engineer, an employee of the appellant, to turn on the

blowers in the hold and to turn off the fixed hold lights. This is done in order to lower the temperature in the hold which inevitably rises while the plugs are off and the hold is being loaded.

At 1:00 A.M. the longshoremen returned to work. Their first task was to remove the plugs. The reefer engineer has the duty at this time to turn off the blowers and to turn on the fixed hold lights.

Williams and another longshoreman climbed down onto the plugs and hooked the key plug onto a wire sling connected with the cargo winch. Both longshoremen then got out of the way, Williams by leaving the hatch. It is necessary to get well away because a plug is large and heavy and there is a possibility that it may swing. There is no evidence as to where his partner went.

The winch lifted the plug and carried it over to the inshore deck of the ship where it was unhooked by two other longshoremen.

Williams then started back into the hatch to hook up next plug. He came back by walking sideways along the coaming holding onto the guard rail until he was in position above the ladder which leads into the hold. At that point he stepped back and down to the first handhold on the ladder, slipped on the frost which had formed there and fell through the 9'6" by 4 foot opening into the hold, sustaining very serious and permanently disabling injuries.

The method used by Williams of leaving and returning to the hatch was one customarily used by longshoremen.

The usual lighting provided by a ship for night work while a hatch is being uncovered is as follows: permanent floodlights on the king posts, or masts, shining down in the area, some small amount of reflected light from the dock lights, portable cargo lights supplied by the ship and fixed lights in the hold.

At the time Williams was injured, however, the floodlights from the king post and the lights from the dock were both blocked out by the presence of a large tent over the hold. The lights in the hold which throw light up on the ladder were not turned on. The only lighting available was that given off by the cargo lights.

After the hatch has been opened the cargo lights are hung down into the hatch. However, until the hatch has been opened, they cannot be hung down in this manner.

The usual cargo light, and presumably the ones supplied, is uninsulated. It uses a three hundred watt globe with a reflector. There is a wire cage over the front which is flat so that it can be placed face down when it is not in use. There are two ways to hold these lights: by a cord fastened to the base of the light or by holding the uninsulated base in the hand. The cargo lights were turned on at least eight hours before the accident.

When the cargo lights are sitting on the deck before the hatch has been completely opened, the hatch coaming blocks off most of the light they give from the hatch area.

The only place provided for lashing a cargo light so that it will light the hatch area is to the guard rail which runs in front of the winch driver. There is an ever present danger that it may be smashed by a swinging plug if this is done.

If a longshoreman were to hold a cargo light so that it shone in the area it would be almost impossible to hold the light in such a fashion as to give effective lighting and not run the very real danger of temporarily blinding one of the constantly moving longshoremen in the partly opened hatch area or the winchdriver.

In the area by the ladder frost or ice had formed from the action of the cold air blown up from the hold striking the warmer air above.

Williams was unable to see that this area had frosted up, because of the inadequate lighting provided by the ship, and slipped on the frost and fell into the hold.

On the basis of the facts presented, the arguments made by counsel, and the instructions of the court, the jury found that the defendant was negligent or that the ship was unseaworthy and returned a verdict in favor of the plaintiff.

ARGUMENT.

I

THE JURY FOUND THAT WILLIAMS WAS INJURED DUE TO
THE NEGLIGENCE OF THE SHIPOWNER OR THE UNSEA-
WORTHINESS OF THE VESSEL AND SUCH FINDINGS ARE
SUPPORTED BY SUBSTANTIAL EVIDENCE.

Counsel for appellant throughout his brief ignores one of the most important aspects of this case. Each and every factual issue urged here either was or could have been argued to the jury. The jury decided adversely to him and found that the ship was unseaworthy or that the shipowner was negligent or both.

On disputed questions of fact the verdict of a jury will be treated as controlling for even if the question is a close one that fact will not justify either the trial judge or the reviewing Court in usurping the function of the jury.

Gardiner v. The New York & Porto Rico SS Co., 146 F2d 420 (CCA 2d 1944);

Jacob v. City of New York, 315 US 752, 757, 86 L Ed 1166, 62 S Ct 854;

Norris, The Law of Seamen, Sec. 697.

At the close of this brief, after arguments raised by appellant have been answered this point will be discussed further.

A. The evidence shows that Williams slipped and fell after he had stepped down to the first rung of the ladder.

The substance of Williams' testimony is that at the time he fell he had one foot on the top of the hatch coaming and had stepped down with the other foot. He had stepped, of course, on the top rung of the

ladder, the handhold. That foot slipped and he fell. This was clearly understood on trial.

Pertinent extracts of his testimony are as follows:

Mr. Williams testified in part as follows:

Q. Well, as I understood your testimony, you started here—on direct—and then something happened and you got knocked unconscious, is that correct?

A. I says my last remembrance is *when I stepped down*, my foot slipped, that's the last remembrance I had. I don't remember the rest, what happened after then, I don't remember. (59.)

The following testimony in the deposition of Williams was read on trial by counsel for the appellant:

Q. Now you say at the time you fell, you had one foot on this, what do you call it?

A. On that, yes, on the coaming.

Q. On the coaming?

A. Yes, sir.

Q. I see. And the other foot was where?

A. Getting off, where I was getting off, just like (indicating)——

Q. ——You stepped back with the other foot, is that right?

A. You have to step back. (253.)*

Other pertinent testimony on this point was given by Houston Hall, a longshoreman:

Q. Did you notice when you went over to see what had happened, did you notice any unusual substance in the area?

*Otherwise unidentified arabic numerals in parentheses are page references to the printed transcript.

A. Well, naturally when there's someone falling, and I come over there to look, I try to see what happened or hear what happened, and I could see upon the frosty part, just like something hit there and slid off, up above the steps, just like it hit there and slid. (indicating.) (135.)

It is entirely reasonable to infer, if such inference be necessary, that Mr. Williams had put his foot on the upper handhold at the time he fell. Hall, in court, indicated the area of the skid mark as being close to and below the upper handholds.

A reasonable interpretation, and the one that was made at trial, of the words "When I stepped down, my foot slipped", is that the person concerned had stepped someplace. The only place to step when one "starts back down to hook up the next plug" is on the upper handhold.

This particular point was not argued on trial nor mentioned at the time that appellant was making his motion for a directed verdict which is printed in the printed transcript at pages 283 and following.

If there are two possible interpretations of the meaning of words used and two possible inferences to be drawn the meaning and the inference which will support the verdict of the jury should, of course, be drawn.

B. The evidence shows that the lighting in the area of the plugs, the ladder and the coaming was so inadequate as to render this area unsafe.

The top of the hatch coaming is 2 feet 9 inches above the level of the plugs (241). The distance from the plugs to the first handhold is 1 foot 6¼ inches (241).

The substance of appellant's argument is that although the lighting was admittedly inadequate on top of the plugs there is no showing that it was inadequate 1 foot 6¼ inches above the top of the plugs. Plaintiff's exhibit 6F, a copy of which is attached to appellant's brief, shows the absurdity of this contention.

The testimony of the witnesses indicates that light from the flood lights on the king post was blocked off by the tent, light from the dock lights was largely blocked by the tent and was of no importance so far as lighting the hatch area is concerned (235, 236), and that the fixed hold lights were not on. The only lighting available was that given off by the cargo lights which were sitting on deck, face down on their wire guards. The coaming stands 28 inches above the deck. (180.) The coaming stands 8¾ inches above the top of the winch platform. (239.)

It is manifestly impossible for the cargo lights, facing the deck, to provide any appreciable amount of light in the hatch area, on the coaming or elsewhere because the light would be blocked by the coaming. Therefore it is clearly shown, and the jury apparently so found, that there was inadequate lighting in the area from which Williams fell.

William J. Wines, called on behalf of the appellant, testified in part as follows:

Q. Now in this particular——

A. On deck.

Q. ——night, when you returned to work, to the best of your recollection, will you tell us whether or not there was any cargo light hanging on the guardrail behind which the winch driver stands? I mean any place along the guardrail?

A. There was two laying offshore and one kind of setting up, one was laying flat and one setting up so it's kind of—well, it didn't flash the whole light on, but it was a dim light on the hatch. (310.)

* * * * *

Q. I see. And that was on the offshore side. Would you tell us where it was setting?

A. Setting right by the hatch, right by the coaming.

Q. And shining across the hatch?

A. It wasn't shining across the hatch, it was shining just against the hatch. It was a little below the coaming, offshore. (311.)

* * * * *

Q. Where was it in reference to the rail, in reference to this guardrail, where was it?

A. On the other side on the deck here, like this.

Q. You mean on the main deck?

A. On the main deck, yes.

Q. And not on the winch driver's platform?

A. No, no. (312, 313.)

Relevant parts of the testimony of Houston Hall are as follows:

Q. Well, Mr. Hall, on this particular evening, what lighting was provided by the ship?

A. The ship there had a cargo, had cargo lights which they hang aboard the ship in the coaming. That was the only light, then, which was, at the time he fell, you see, they couldn't hang those lights there because it would cut them off and so they naturally, then, *they were down upon the deck.* (131.)

* * * * *

Q. That is to say, you couldn't leave the cargo lights hanging down there where the men were working, you had to haul them up before you put the plugs on and put them somewhere on deck, is that correct?

A. Yes. (140.)

This evidence shows that the cargo lights were sitting on the deck at the time Williams fell. Even if the jury chose to believe that a cargo light was sitting on its side it would make no appreciable difference in the amount of lighting available in the area from which Williams fell.

Counsel for the appellant seeks to draw an inference that the lighting was adequate from the fact that none of the longshoremen present in court had complained about the lighting. If such an inference could be drawn the jury could have drawn it. An equally plausible inference is that the longshoremen had a job to do and wanted to get it done.

C. Sufficient testimony as to the presence of frost in the area from which Williams fell was presented.

Both eyewitness testimony and expert testimony was presented on this point. Appellants also called an expert witness to dispute the issue. The jury heard both opinions.

Relevant extracts from the testimony of Houston Hall, an eyewitness, is as follows:

Q. Then you were pointing right here, is that correct?

A. I could see the frost, it was formed, ice was, approximately, ice up here, but it was frosty up here, from where the plug was pulled out. Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms. (141.)

* * * * *

Q. Is that where you saw the frost?

A. I saw it up here, it was forming, you know, the fog.

Q. You mean up in this area here, is that right?

A. Yes.

Q. Along the face of the iron, is that what you are telling us?

A. Yes, in here, yes, because when they pulled the plug up, well naturally, the cold air blowing with the blowers on, it sheets it up. (142.)

Relevant parts of the testimony of Jim Hotchkiss, a refrigeration engineer, are as follows:

Q. Mr. Hotchkiss, let's take this area, this enclosure here, for instance. If this area is closed, as shown up here in Plaintiff's exhibit No. 2, and the air in that area below is refrigerated to 10

degrees, and then that area is opened by lifting out a section of it, as shown here in Plaintiff's exhibit No. 1, resulting in an opening as shown in Plaintiff's Exhibit No. 3, and the air outside here, prior to the removal of this object here, was 52 degrees, would the meeting of those two airs at different temperatures cause any foreign—any substance at all to be deposited in the area shown here? And I will mark this.

A. Use my pen.

Q. All right, mark it L-1.

* * * * *

The Court. All right, now you can answer the question.

The Witness. It would cause, as the temperature dropped, an immediate temperature drop and precipitation of moisture here. You have a difference of 10 degrees below, there's 52 degrees here. I would say that there would be an immediate temperature drop to below 32, causing, as she dropped, precipitation of moisture from the atmosphere, then freezing of such moisture at that point. (196, 197.)

The testimony of the above witnesses was thus, to the effect that on the night Williams was injured there was frost on the hatch coaming in the vicinity of the ladder (the word "iron" used by Hall meant the coaming) and expert testimony that this was a natural and usual physical phenomenon.

D. Sufficient testimony was presented to show that the fixed hold lights were not on, that the Refeer engineer had a duty to turn them on and had not done so, and that if the hold lights had been on that they would have lighted the area of the ladder.

The blueprint of the ship was introduced into evidence. According to the blueprint the twelve fixed lights in the Number 5 hold had the following specification: "Water tight cargo fixture with guard, 100 WATTS". (225.)

Counsel for appellant objected to the introduction of direct evidence as to the effect of the lack of the hatch lights.

Relevant extracts from Ray Stewart's testimony are as follows:

Q. If the hatch lights were on, would it have made a difference in the visibility there, Mr. Williams*?

Mr. Cooper. Object to that, calls for the conclusion of the witness, if the Court please. (86.)

* * * * *

Q. (by Miss Johnson). If the hatch lights had been on, could you, would it have made any difference in your work——

Mr. Cooper. Same objection, if the Court please, calling for a conclusion.

The Court. Sustained. (86.)

Williams testified in part as follows:

Q. Mr. Williams, do you know where the nearest light to these steps is located on the ship, fixed light?

*The question was actually addressed to Mr. Stewart.

A. Well supposed to be down in the bottom.

Q. Would you point out—I don't believe you have the other pointer.

A. It is supposed to be down here.

Q. Do you know how many lights are supposed to be up under there?

A. I don't know exactly just how many.

Q. Is it more than one?

A. Yes, it is supposed to be some for each plug they take out.

Q. On the night that this accident happened, when the key plug was taken out, were those lights on?

A. No, they were not on. (80.)

A relevant extract of Stewart's testimony is as follows:

Q. It was not. How do you know the hatch lights weren't on?

A. Because it was dark when I looked down those steps. (86.)

t

The question of whether these hold lights would light the area from which plaintiff fell was argued at length to the jury. The situation is comparable to one in which a door to a lighted room is opened into a dark room. Through the doorway light streams. Here, when the key plug was removed, light from the fixed hold lights should have streamed through, and lighted the ladder area. The lights were not on; no light came up.

II.

SUFFICIENT EVIDENCE WAS PRESENTED TO SHOW THAT THE LIGHTING PROVIDED BY THE SHIPOWNER WAS INADEQUATE AND FOR THIS REASON THE SHIP WAS UNSEAWORTHY OR THE DEFENDANT WAS NEGLIGENT.

Counsel for appellant states that there was uncontradicted evidence that all necessary equipment and electrical power to adequately light the area was furnished by it to the longshoremen.

This is not the case. There was evidence which showed that three cargo lights were furnished by it to the longshoremen and that this was the only effectual lighting available at the time Williams fell. The question as to whether these cargo lights provided or could have provided sufficient illumination at the time Williams fell was sharply controverted and the jury decided adversely to the appellant.

There was insufficient illumination on top of the plugs and on the inside of the coaming, including the ladder area, so long as the cargo lights were sitting on deck, either face down or on their side because the outside wall of the coaming would block off the greater part of the light which they gave.

Counsel for appellant suggests that these cargo lights could give sufficient illumination in the area in which Williams was working if the longshoremen did one of the two following things: lash a light on the offshore side of the guard rail near the winch driver, or station a longshoreman to hold one of the cargo lights so that it would shine in the hatch area.

The plugs are large, heavy objects with a tendency to swing when they are being removed from the hatch. If a plug were to hit a cargo light it would smash the light and undoubtedly send splinters of glass and metal flying around the area. Even Wishard, first mate of the SS FLEETWOOD, did not advocate that this be done.

The pertinent parts of his testimony are as follows:

Q. Would it be a good practice, taking into account your duties to guard the gear of the ship and keep it from being broken, to have a lamp such as this lashed on the offshore when they are removing plugs in that area?

Mr. Cooper. Read the question, please. I am not sure I understood it.

(Record read.)

A. I would rather not have them do it.

Q. (by Miss Johnson). Is there danger of the light being broken?

A. If they lift the plug in a hurry, it would, maybe, smash the light. (181.)

Mr. Wishard estimated that the plugs weigh close to 400 pounds each. (181.)

The danger that the light would be smashed was substantiated by other witnesses.

Counsel's second suggestion (i.e. that a longshoreman hold a cargo light and shine it in the hatch area) is essentially a suggestion that the way to remedy one dangerous situation is to substitute another equally dangerous. There are two men in the hatch area re-

moving plug and a winch driver at the end of the hatch. It would be virtually impossible to hold a bright, hot cargo light in such a way that it would light the area and yet not shine it in the eyes of one of the men working in the undeniably dangerous, partially open hatch area. This was grudgingly admitted by the 1st mate, Wishard.

Pertinent parts of his testimony are as follows:

Q. (by Miss Johnson). Now, Mr. Wishard, when are those lights turned on?

A. When the longshoremen plug them in, if they are not already plugged in.

Q. Well, when there's a night crew on, what time would they be plugged in?

A. Oh, at sundown or during the day. They plug them in any time they wish them.

Q. But in any case, it would be by 7:00 in the evening. Do they remain on all evening?

A. They do.

Q. Then the lights in use around the No. 5 hatch had been on from 7:00 in the evening until 1:00 in the morning, is that correct?

A. They had.

Q. Without being turned off?

A. Right.

Q. Mr. Wishard, every light that I have anything to do with heats up. Does not the 300-watt bulb heat up?

A. *They heat up very, very much.*

Q. Then how could they hold it in the position you have just suggested?

A. I have never seen anybody get burned and I have held them. The guard, itself, I mean the shade, itself, doesn't seem to heat up that much.

Q. Could you hold it barehanded?

A. Yes.

Q. After it has been on from 7:00 in the evening until 1:00 in the morning?

A. Yes.

Q. You could hold the guard?

A. Yes.

Q. Does this give a bright light?

A. 300 watts?

Q. Yes.

A. Yes.

Q. Have you ever looked into a 300-watt light?

A. I have.

Q. And did it affect your vision?

A. It did.

Q. What happened?

A. Well, for a minute it blurs you.

Q. When the stevedores, the longshoremen, are removing plugs, are they, the men actually in the plug area, are they in one position at all times or do they move around?

A. They move around.

Q. Do they get up and down?

A. They do.

Q. Do they squat down to hook in the hooks, stand up, walk back, climb up on the coaming and so on? Is that correct?

A. They do.

Q. In other words, do they face different ways?

A. In their job, yes.

Q. So that if this were faced down into the hold, if they were squatted down, would it be possible the light would shine in their eyes?

A. In one instance, maybe. (178 ff.)

Ray Stewart confirmed this testimony.

Q. Then the light or lights. If a cargo light were shown, were held up, have you ever looked into a cargo light when it has been held up.

A. Yes.

Q. What was the effect upon you?

A. It blinds you. (103.)

Houston Hall also confirmed this. His testimony has reference to cargo lights.

Q. And did he have it down on the cord or was he holding it in his hand, or how?

A. Well, he has got to hold the light down at all times, because if he come up there and holds the light up, well, that would blind the winch driver. The winch driver can't see. (138.)

The same problem could be presented if a cargo light were lashed to the guard rail.

Counsel for appellant has taken the position that sufficient and adequate lighting was supplied to the longshoremen when the cargo lights were given to them. They take the further position that the presence or the absence of any other lights is immaterial.

If we assume for the sake of argument that his position is correct then we are presented with one simple question, "Were the cargo lights, in the absence of other effective lighting, sufficient to provide a safe and seaworthy place to work?"

This question was presented to the jury and the jury apparently found that in view of the above testi-

mony that the cargo lights by themselves were not sufficient to adequately light the area from which Williams fell at the time he fell.

The shipowner has an absolute, non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen.

Seas Shipping Company v. Sieracki (1946), 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872;

Petterson v. Alaska SS Co., 205 F. 2d 478, affd. without opinion by the United States Supreme Court in 348 U.S. 914.

As the Court in the *Petterson* case declared:

“The exercise of due diligence does not relieve the owner of his obligation to furnish adequate appliances. * * * It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury; or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. (*Mahnich v. Southern SS Co.*, 321 U.S. 96, 64, S.Ct. 455, 88 L.Ed. 561.)”

The jury could reasonably have found that the appellant breached his obligation to furnish adequate appliances to the longshoremen.

The United States Supreme Court held in the case of *Mahnich v. Southern S.S. Co.* (1944), 321 U.S. 96, 103, 88 L.Ed. 561, 64 S.Ct. 455 that the appliance must be adequate for the purpose for which it is ordinarily used and its inadequacy renders it unsea-

worthy. In this case the appliances, i.e. the cargo lights, were inadequate for the purposes for which they were supplied, i.e. to light the hatch area while the hatch was being opened, therefore they were unseaworthy.

After Williams fell a cargo light was picked up by a longshoreman and hung down into the hatch below the level of the plugs in order to see what or who had fallen. This fact bears no relation to the adequacy of the lighting at the time Williams fell. It was agreed by all witnesses that the cargo lights could not be put in the hold until the plugs were removed under normal circumstances. The fact that it was necessary to lower a light merely serves to substantiate the fact that the hold lights were not on.

Counsel for appellant has cited many cases all of which presuppose that an adequate amount of light was supplied to the longshoreman. This is a basic issue in this case and since the jury could have found that the cargo lights were inadequate and that the hold lights were not on and the tent blocked other lighting and that therefore the lighting supplied was, in fact, not adequate these cases have no application.

III

THE HOLD LIGHTS CAST ILLUMINATION IN THE AREA FROM WHICH PLAINTIFF FELL IF THEY ARE ON.

Counsel for appellant argues that the fixed hold lights were not intended by the shipowners to light the hatch coaming area.

This is not a situation in which an item intended for one purpose is used for another. This might be a reasonable argument if a longshoreman had been using a hatch light fixture to lift cargo. Cases cited by appellant fall in this category. Lights have but one use, that is, to provide illumination. The intention of the shipowners in providing these lights was presumably to provide illumination in the hatch area and whether they would provide and were intended to provide light in one area and not in a place three or four feet away is a question of fact which was argued to the jury.

It could reasonably be inferred from the testimony given that the hold lights would have provided light in the area from which Williams fell had they been on and that they were used and relied upon by the longshoremen for this purpose.

IV

THE SO-CALLED "COOKINGHAM" OR "TRANSITORY DOCTRINE" IS NOT THE LAW IN THE 9TH CIRCUIT, AND IF IT WERE IT WOULD NOT APPLY TO THE FACTS OF THIS CASE.

The Cookingham or "Transitory Doctrine" is simply the old-common law "slipping" doctrine applied in seaman and longshoremen cases. The basis of this doctrine as stated in *Cookingham v. United States*, 3rd Circuit, 184 F. 2d 213, is that there should be no liability under the doctrine of unseaworthiness

on a shipowner for a temporarily unsafe condition on shipboard when he has no *knowledge or control* over its happening and has not had an opportunity to correct it.

In this case a foreign substance, to-wit, jello, had been spilled on a stairway and there was no showing as to where it came from.

In all cases where it has been applied the basis of the plaintiff's cause of action has been the presence of a foreign substance, oil, food, water, etc. on a deck or stairway, and no showing was made that the defendant knew or should have known that it was there.

Such a doctrine has nothing to do with the facts presented in this case. The defendants knew of the presence of the tent which cut off all lighting except that supplied by the cargo lights and the hold lights. They knew that the hold lights were not on—they turned them off and had the duty to turn them on. They knew or should have known that the hatch area would not be a reasonably safe place to work while the plugs were being removed because the longshoreman had only two unsafe alternatives: to work with inadequate lighting or to risk being temporarily blinded by a cargo light. This dangerous situation existed over and over again, when the ship was being worked at night over a period of years.

Appellant had both knowledge and control, of the lighting provided the longshoreman.

Such a doctrine has no more relevance to the facts of this case than it would in an automobile accident

case where the defendant neglected to watch where he was going for just a moment.

However, even if this doctrine could be applied to the present case it is not the law in the Ninth Circuit.

In the recent case of *Petterson v. Alaska S.S. Co.*, 348 U.S. 914, 205 F. 2d 478 (9th Circuit), the Court in its opinion stated:

“It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. *Mahnich v. Southern SS Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L.Ed. 561.”

In regards the so-called “relinquishment of control doctrine” the Court in its opinion stated:

“The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown the major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here.”

This language could equally well be applied to the present case. The basis of the “transitory” doctrine is knowledge, control, and opportunity to remedy. These are essentially negligence requirements and have no place in an action under the doctrine of unseaworthiness.

The language in the recent 9th Circuit Court of Appeals case, *Lahde v. Soc. Armadora Del Norte, a corporation*, 220 F. 2d 357 (1955), would seem to deny the "transitory" doctrine. In this case libellant sought damages for injuries arising from his falling into an open hatch in an illy lighted passage way leading to his place of work. The District Court dismissed the libel on the grounds that it failed to state a cause of action either based on unseaworthiness of the vessel or on negligence of the crew. This decree was reversed. The Court in its opinion stated:

"However, under recent decisions of the Supreme Court, we think such a cause of action is stated even though the unseaworthy condition is *unknown* to the owner. *Boudoin v. Lykes Bros. Steamship Co., Inc.*, 75 S.Ct. 382. There Boudoin, a seaman, recovered damages for a blow on the head from another seaman. The attacking seaman, on evidence of his conduct *after* his attack, was found to have a savage and vicious nature, so different from the ordinary seaman that his presence made the vessel unseaworthy and recovery was based on that ground. There is not the slightest evidence that the owner knew or could have known of the vicious character of the attacking seaman when Boudoin was hit on the head and the cause of action arose. The district Court held the vessel unseaworthy because of the attacking seaman's vicious nature and that '*the warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial.*' *Boudoin v. Lykes Bros. S.S. Co., D.C.* 112 F. Supp. 177, 180. The court of appeals

reversed, holding that the 'shipowners' were not shown to have knowledge of the seaman's character.

The Supreme Court in reversing the court of appeals and affirming the district court, stated (75 S.Ct. 385):

'We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect.'

The failure to replace the gear of the two hatchboards on the open hatch in the dim light is certainly as dangerous as unseaworthiness as the vicious nature of a crew member. Here, as in the latter case, the vessel would be liable though **the unseaworthiness is unknown to the owner.**'

The Court then cited the case of *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 456, 88 L.Ed. 561 at length and in particular emphasized the following quotation:

"Whether the petitioner (the owner) knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. (Citations.)

The Court then stated:

The shipowner as much owed to its invitee stevedore as to a sailor the duty to furnish 'the employee * * * a safe place to work' and 'is non-delegable' as it is not in 'non-maritime'.

It is immaterial whether the shipowner, invitor of the stevedore on the ship, knew of the failure to place the ship's 'appliances', here two hatch-boards, on the open hatch dangerous in the defective lighting, since it owed the same 'non-delegable' duty to furnish him a safe place to work as does a land employer."

This case seems substantially similar to the *Lahde* case and certainly the same reasoning should be applied.

THE COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE CERTAIN INSTRUCTIONS REQUESTED BY APPELLANT.

I.

Appellant's proposed Instructions Nos. 4A, 4B, 7A and 7B.

These instructions all deal with the "Transitory" conditions. The Court below did not commit error by refusing to give them for the reasons outlined in the section immediately preceding this section.

II.

Appellant's proposed Instruction No. 11A.

This instruction states in effect that the cargo lights by themselves constitute adequate lighting at the time Williams was injured. The Court below did not commit error by refusing to give this instruction because this was, actually, one of the basic factual issues of the case and it was correctly submitted to the jury for their consideration and decision.

Appellant was adequately protected by the following instruction which was given by the Court below:

“You are instructed that the actual loading operations of the vessel were being done by the stevedoring company, the West Coast Terminals, Inc., and their employees, the longshoremen. If the defendant’s duty to furnish a seaworthy vessel, together with seaworthy equipment and appliances, and its duty to provide a reasonably safe place to work, has been fulfilled, and thereafter, without the knowledge of the ship operator, the stevedores negligently or improperly used, handled or rigged such equipment and appliances, the ship operator, the defendant in this case is not liable for the consequences.”

III.

Appellant’s proposed Instructions 21A and 21B.

These instructions, in effect, direct the jury to find Williams guilty of contributory negligence because he knowingly proceeded into an area that he could see was insufficiently lighted.

The Court below did not commit error by refusing to give these instructions for two reasons.

First, the question of whether or not Williams was guilty of contributory negligence, and if so, the extent thereof, is a question of fact for the jury. Adequate instructions on contributory negligence and the doctrine of comparative negligence were given by the Court below.

Some of the instructions in regards contributory negligence which were given are quoted below.

“For your guidance, contributory negligence is defined as such an act or omission upon the part

of the person injured, amounting to the want of ordinary care, as, concurring and co-operating with the acts of a defendant, is a proximate cause of the injury complained of.

* * * * *

As it was the duty of all of the defendant's employees to exercise ordinary care, so it was the continuing duty of the plaintiff to exercise like care for his own safety, and, in so doing, to make a reasonable use of his faculties to warn him of any danger. If he failed in such duty, he, himself, was negligent. If his negligence was the sole proximate cause of the accident, then he may not recover."

The jury had been previously instructed on negligence, unseaworthiness and the burden of proof.

The case of *Read v. United States*, 201 F. 2d 758, differed from this case so widely as to be in no way applicable on this point.

Second, although counsel for appellant uses the words "contributory negligence" he is actually requesting instructions under the doctrine of assumption of the risk rather than contributory negligence. In the case of *Kulukundis v. Strand*, 202 F. 2d 608 (C.A. 9th, 1953), plaintiff, a longshoreman, was standing on a hatchcover trying to pry another hatchcover into place when the hatchcover upon which he was standing became dislodged and he fell into the hold. The cover on which he was standing was not properly fitted. This he knew or should have known. The Court declared:

“Appellant contends that Strand assumed the risk of injury by continuing to work at closing the hatch after observing the danger involved, and that relief is consequently barred. We do not agree.”

The Court then continued to the effect that assumption of the risk is not a defense barring relief in cases involving longshoremen.

The fact situations are substantially similar.

Misnaming the doctrine of assumption of the risk, as contributory negligence does not change the essential nature of the defense.

IV.

Appellant's proposed Instruction No. 26A.

This is again an instruction under the doctrine of assumption of risk, a barred defense.

The appellant was adequately protected by the following instruction given by the Court below.

“Under the law that governs this case, the ship operator does not insure or guarantee any persons against the possibility of accident. Its duty is to exercise ordinary care and to provide a seaworthy ship and appliances. Insofar as it performs those duties, it fulfills the law and incurs no liability for accidental injury. Inherently in the nature of a steamship business are certain hazards. But even such dangers do not make the company an insurer or change the rule of liability that I have stated. Although in the exercise of ordinary care, the amount of caution required increases, as does the danger that is

known or that reasonably should be apprehended in the situation. In a case such as here presented, there is no legal presumption that negligence on the part of the defendant or its agents or employees or of any unseaworthiness of the defendant's vessels or its gear or appliances, or of contributory negligence on the part of the plaintiff."

In addition the instruction is so written that it sounds as if the jury is ordered to bring in a verdict for the defendant if they find that Williams slipped on ice or frost, and that the whole question of the adequacy of the lighting is irrelevant.

V.

Appellant's motion to instruct the jury to disregard testimony regarding the fixed hold lights.

This issue has been heretofore discussed. Suffice it to say that there is evidence that the hold lights were not on, that it is the duty of an officer of the ship to turn them on, and that when they are on they provide illumination in the area from which Williams fell.

THE FINDINGS OF THE JURY THAT WILLIAMS WAS INJURED DUE TO THE NEGLIGENCE OF THE APPELLANT OR TO THE UNSEAWORTHINESS OF THE VESSEL SHOULD BE UPHOLD SINCE SUCH FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

No election was made between the cause of action for unseaworthiness and the one for negligence.

The jury could have found for the plaintiff under any one of the following theories, each of which is

supported by adequate evidence. It is, of course, necessary only that one of them be supported.

The jury could have disregarded all testimony regarding the hold lights and found the ship unseaworthy because the blinding cargo lights were not suitable lighting while the hatch was being opened, and that this unseaworthiness was the proximate cause of Williams' injury.

The jury could have disregarded all testimony regarding the hold lights and found that the shipowner was negligent in not providing more adequate lighting than the blinding cargo lights at the time the hatch was being opened in that the shipowner knew, or should have known, that these would not be sufficient particularly in view of the presence of the tent, and that this negligence was the proximate cause of Williams' injury.

The jury could have found the shipowner negligent in that the hold lights were not turned on resulting in inadequate lighting and that this negligence was the proximate cause of Williams' injury.

The jury could have found that the ship was unseaworthy in that the shipowner did not provide him with a reasonably safe place to work because the hold lights were not on, and that this was the proximate cause of Williams' injuries.

The jury could have found the ship unseaworthy or the shipowner negligent in that the hold lights were not on and the blinding cargo lights did not provide adequate illumination and that this neglect or unsea-

worthiness was the proximate cause of Williams' injury.

The evidence supporting each of these theories has been heretofore discussed and it will be mentioned only briefly here.

The evidence clearly showed that the only illumination provided by the ship at the time Williams fell was from the three cargo lights. The light from the floodlights was blocked by the tent, the dock lights give almost no illumination, and the hold lights were not on.

The evidence also showed that the cargo lights give an exceedingly bright light and that there would be grave danger of temporarily blinding a longshoreman working in the partially opened hatch area if they were held in such a fashion as to shine into the hatch area. There was no way to hang these lights up high enough to provide effective lighting and at the same time eliminate the possibility of blinding a longshoreman.

The evidence showed that it was the duty of a ship's officer to turn on the hold lights and that they were not on. It also showed that had these lights been on that they would have cast some light on the ladder area from which Williams fell.

The evidence showed that the ladder area had frosted up temporarily and that Williams could not see this due to the inadequacy of the lighting.

The jury could and apparently did find in view of all the evidence presented that the area was not ade-

quately lighted and that this inadequacy was due to the unseaworthiness of the ship or the negligence of the shipowner. They could and apparently did find that this inadequate illumination was the proximate cause of Williams' fall.

CONCLUSION.

Substantial evidence was presented to the jury upon which they could have found that the ship was unseaworthy or that the shipowner was negligent in failing to supply adequate lighting and that the unseaworthiness or neglect was the proximate cause of Williams' fall and his serious and permanently disabling injuries.

Since the verdict of the jury, as modified by the Court below, was not made with a capricious disregard of competent evidence, it is respectfully submitted that the verdict of the jury as modified by the Court below should be affirmed.

Dated, San Francisco, California,
September 23, 1955.

MELVIN M. BELLI,
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Attorneys for Appellee.

No. 14,706

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC FAR EAST LINE, INC., a Corpora-
tion,

Appellant,

VS.

JOHN WILLIAMS,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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Appellant's Reply Brief

Appeal from the United States District Court for the
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Appellee seeks to show in his brief (1) that one of his feet was on the first rung or step of the ladder leading into the hold; (2) that it was that foot which slipped; (3) that there was frost or ice on that rung which caused him to slip; and (4) that if there had been sufficient light afforded he would have been able to see the frost or ice and avoid the accident. Appellee has failed to refer to testimony which meets his burden of proof in these respects.

Appellee has taken the position throughout his brief that many of the questions raised in appellant's opening brief were factual ones and, inasmuch as they were submitted to the jury, the jury's decision is final. Fortunately, that is not

the law. The Supreme Court of the United States has clearly laid down the rule that the jury's finding of fact is not final unless based upon *substantial* relevant evidence and substantial has been defined as "such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion." As indicated in Appellant's opening brief, page 17, that rule has been recognized by this court. It is and has been Appellant's contention that the things which plaintiff was obliged to prove in the case did not meet that burden and Appellee has failed to refer to testimony in its brief which meets this burden of proof.

I.

The only reasonable interpretation of the evidence furnished by Plaintiff-Appellee as to where Plaintiff was at the time he slipped is that it was on top of the hatch coaming and not on the first rung of the ladder.

The contention is made in Appellee's brief that it should be *inferred* from the testimony taken as a whole that Plaintiff's foot had reached the first rung of the ladder after he stepped back. There is a considerable amount of testimony plainly disproving this which is quoted in our opening brief (pages 18-20) but for the convenience of the court we quote some of it again as follows:

"Q. Now, you say at the time you fell, you had one foot on this, what do you call it?

A. On that, yes, on the coaming.

Q. On the coaming?

A. Yes, sir.

Q. I see. And the other foot was where?

A. *Getting off*, where I was getting off, just like (indicating)—

Q. You stepped back with the other foot, is that right?

A. You have to step back."

* * * * *

“Q. I see, now correct me if I am wrong. *Your foot was somewhere along this hatch coaming* (indicating)?

A. Yes, sir.”

The part italicized above clearly indicates one foot was on the top of the hatch coaming and Williams was “getting off” with the other.

At no place in his testimony did Williams say that his foot he was getting off with had reached any rung of the ladder. If it had been a fact he could have and would have said so, and his counsel would have made sure that he was asked that precise question so that the answer would get into the record. That this interpretation is proper is indicated by the testimony of Houston Hall where he said in reference to what he saw on the face of the hatch coaming:

“* * * Just like something hit there and slid off, *up above the steps.* * * *” (135)

(Throughout the case the means of descending into the hold was described as a ladder and the place where the longshoremen can put their feet and hold on to with their hands was described as steps on the ladder.)

Inasmuch as the evidence shows Appellee had one foot on the top of the coaming and fails to show that his other foot had reached any rung of the ladder, it could only have been the first foot which slipped. That is the only reasonable conclusion. At the trial plaintiff did not show, and in Appellee’s brief it is not contended that there was any frost or ice on the top of the hatch coaming, or that the light there was insufficient. Obviously such a contention would be untenable. Therefore, if Williams slipped, as the evidence shows he did, with his foot on top of the hatch coaming he plainly has no case.

II.

Appellee's contention that there was frost or ice on the first rung of the ladder where it is claimed appellee slipped is not based upon any substantial evidence offered by plaintiff's expert or by any evidence as to the facts.

It may be stated at the outset (assuming for the purpose merely of the argument that Williams did slip when one foot was on the top rung or step of the ladder) the distance from the top of the reefer hold to the rung is 2' 9 $\frac{1}{4}$ " (240-243). Appellee argues that while two experts, one for the plaintiff and one for the defendant, testified as to whether there would be frost or ice where the plaintiff slipped if the key plug was lifted out, the jury was privileged to accept the testimony of plaintiff's expert, Mr. Hotchkiss.

Mr. Hotchkiss' testimony is of no value for at least two reasons. First he did not testify that in the short interval of time involved frost or ice would form almost three feet (actually 2' 9 $\frac{1}{4}$ "") above the top of the reefer hold (the distance from a point level with the bottom of the plug which had been removed and the first step or rung of the ladder below the top of the hatch coaming). He merely testified that in general frost or ice would be precipitated when the air in the reefer hold of a temperature of 10° Fahrenheit came in contact with the air above of a temperature of about 52° Fahrenheit. All the testimony he gave on that is as follows:

"Mr. Chandler: Mr. Hotchkiss, let's take this area, this enclosure here, for instance. If this area is closed, as shown up here in Plaintiff's Exhibit No. 2, and the air in that area below is refrigerated to 10 degrees, and (185) then that area is opened by lifting out a section of it, as shown here in Plaintiff's Exhibit No. 1, resulting in an opening as shown in Plaintiff's Exhibit No. 3, and the air outside here, prior to the removal of this object here, was 52 degrees, would the meeting of those

two airs at different temperatures cause any foreign—any substance at all to be deposited in the area shown here?” (196)

“The Court: All right, now you can answer that question.

The Witness: It would cause, as the temperature dropped, an immediate temperature drop and precipitation of moisture here. You have a difference of 10 degrees below, there’s 52 degrees here. I would say that there would be an immediate temperature drop to below 32, causing, as she dropped, precipitation of moisture from the atmosphere, then freezing of such moisture at that point.” (197-198)

Second, he erroneously stated that frost or ice would form on the coaming of the hatch even though that coaming was much warmer (which it was) than the cold air which came in contact with it. This statement is absolutely contrary to a well known physical phenomenon which Mr. Hotchkiss had earlier admitted in his testimony was true, namely, that moisture is deposited by air (if it has some moisture in it) striking against an object colder than the air which reduces the temperature of the air to the dew point. In this respect Mr. Hotchkiss testified:

“Q. Actually the air that is 10 degrees is warmed rather than made colder?

A. Its temperature raises.” (209)

This would increase the capacity of the air to retain moisture and there would be no precipitation.

Previously he had testified:

“Q. Mr. Hotchkiss, another important factor, is it not, is whether or not moisture is deposited on a surface, like you have described here, is the temperature of the thing on which it is deposited?

A. Of the surface, exactly.

Q. Yes, so what happens is, when it is up against a surface like the coaming there, that if the surface is warmer, or rather colder than the air which it contacts, the air which contacts the surface, then you have a deposit of moisture?

A. Precipitation.

Q. On that surface?

A. That's right." (206)

This physical phenomena which causes moisture to be deposited when the temperature of moisture laden air is reduced to the dew point is so elementary and universally known that this Court will take judicial notice of it. The Court has the right to and should, we submit, refuse to give any weight to testimony based on obvious error.

Appellee has fallen into error, in stating that cold air rushed up from the reefer hold and caused frost to be deposited on the hatch coaming when, it is stated in the brief, the blowers were on. The fact is the only credible evidence introduced on the point was that contained in the entry in the log which is that the blowers were turned off at one o'clock (117), which is the hour at which the longshoremen returned to this ship to start taking off the plugs. The mishap occurred at about 1:05 A.M. One of plaintiff's witnesses who was a longshoreman did say that there would be frost formed on the bulkhead because the blowers would force the air up (p. 11 Appellee's brief), but that was not responsive to any question and obviously was not based on any knowledge of the witness. It may be unnecessary to add, perhaps, that it is also elementary that cold air is heavier than hot air and will stay, in a situation like this, where it is unless forced out.

If, as Appellee contends, the jury accepted such testimony, the verdict should not be allowed to stand. Mr. Goede-waggen, based on tests and observations, gave direct testimony to the contrary. His testimony was that the freeze

point was never reached by approximately 12° , i.e., the temperature was about $44\frac{1}{2}^{\circ}$ Fahrenheit even when the blowers were on. The temperatures reached with the blowers off was $2\frac{1}{2}^{\circ}$ higher. Testimony in this respect is detailed in Appellant's opening brief (pages 24, 25) and (pages 327, 328, 329 of the record). And, it may be pointed out here that the Goedewaggen temperatures were taken at the top level of the plugs and not where the first rung of the ladder is located (240, 241, 242). It may be further added that the interval of time involved in the test made by Mr. Goedewaggen was several times longer than the time actually involved at the time of the mishap, i.e., the time which elapsed after the key plug was lifted out and swung to the inshore side of the vessel and unhooked by two men and partly swung back. (Williams' body was seen to fall by the winch driver before he got the sling back over the hatch.)

Furthermore, the reefer hold is air tight and the cold air in the hold is merely circulated around inside the hold. It is not drawn in from the outside and is not blown out.

Mr. Maple, the former chief engineer, testified as follows:

"A. The air in the hold, sir, and the hatch is closed air tight and we just circulate the present air in the hold." (347)

His testimony on page 348 of the Transcript explains that the cold air is circulated from the hold to the diffuser room where it is chilled and forced back into the hold. The diffuser room is part of the reefer hold. Consequently, if any substantial amount of air was to be forced out through the small opening created by the removal of the plug, a partial vacuum would be created which would hold the air back. This is demonstrated by the small difference in temperatures when the blowers were on and when off at the plug level, only about $2\frac{1}{2}^{\circ}$.

III.

There is an abundance of testimony in the case that the three cargo lights provided by the ship for the use of the stevedore were entirely adequate to furnish light to the longshoremen when removing the plugs and there is no substantial testimony to the contrary.

These lights had 300 watt bulbs and there can be no question, therefore, as to whether such a big light would adequately light the area in the square of the hatch if properly used.

Appellant's opening brief quoted from testimony given by Mr. Walsh, which was, in brief, that one of three lights was used to furnish light in the hatch while the plugs were being removed.

Mr. Walsh also testified:

"Q. Well, let me ask you this. Suppose he wants to light this area here and he is standing back off on the deck. Could you demonstrate how he could do that without directing the light to that point?

A. Well, if he would hold it any place at that rail, it would shine on the plugs.

Q. Shine on the plugs down here, right?

A. Yes." (278)

"Q. Mr. Walsh, I will ask you, when you cover up the hatch like you did at 12:00 o'clock on the night we are interested in, are the cargo lights removed from the vessel's hold?

A. Yes, they have to.

Q. I see. And then they are placed somewhere on deck?

A. Yes.

Q. And will you tell us whether they are thereafter ever used for the lighting of the hatch in the plugs when you are removing plugs?

A. Yes, they use them. Generally one fellow *holds them or hangs them up.*" (272)

Mr. Wishard, the mate, testified as to how the lights were handled when longshoremen picked them up to shine onto the plugs and one of the longshoremen picked one of them up to shine light down into the hold on the place where Williams had fallen. Wishard also testified that sometimes the longshoremen laid a cargo light on its rim so that it shone across the top of the coaming and lit the square of the hatch area (pages 159 and 164).

Appellee attacks the adequacy of the cargo lights for the use indicated by contending (1) that they *might* shine in the longshoremen's eyes and thus interfere with rather than aid their work (2) if hung on the rail, even on the extreme offshore side, they *might* be smashed by lifting the plug out and (3) that perhaps they were too hot to handle.

As to the last contention, the testimony is all to the contrary and was given by Mr. Wishard and Mr. Walsh.

As to the second, there is no question but that if the work is carelessly done, a plug being lifted out might strike the light. That is true of all work. But two witnesses, Mr. Walsh and Mr. Wishard in their long experience had never seen that happen. All they said was that it *could* happen.

In respect to the first, there are two convincing answers. One is that there is uncontradicted testimony that the cargo lights had been used generally to light the plug area while plugs were being removed and no testimony was introduced that any other method had ever been used when hatch tents are used over reefer hatches. Also there is uncontradicted testimony that these cargo lights were also used to furnish light in and near the square of the hatch for the use of the longshoremen in stowing cargo. One of these lights had been and was generally hung at the corner of the hatch (inshore side) and the two others had been lowered to the point where they were only about the depth of the 'tween deck hatch above the floor of the 'tween deck hatch.

Mr. Wines, the winch driver, testified in part as follows:

“Q. Well, then is it your testimony then, Mr. Wines, that when the plugs are all out, you have two lights hanging down into the hold and one hanging on the coaming, is that correct?

A. Correct.

Q. Or the rail, is that right?

A. Over the coaming, down. Not on the rail, on the coaming.

Q. Yes. When you say coaming, you mean that fence, we will call it, around the hatch?

A. Right over here, right in the corner there. And there's two lower down, lower in the holds where the men are working, at each corner of the hatch, (Indicating.)” (322)

Certainly, if there was any real hazard of the light shining in the longshoremen's eyes, as Appellee contends in his brief, the practice would not have been followed. It may be added that if there was any hazard of getting smashed, the light on the coaming would be subject to it hour after hour as the loading went on and the loaded sling lowered and the empty one raised hundreds of times during one loading operation. In any event, the danger that a light might carelessly be shone in a longshoreman's eyes exists with all portable lights; and, in fact, the peril involved in looking into bright lights would exist in all cases unless indirect lighting were in use.

Actually, there would be no occasion for the longshoremen who were working on the plugs to look up at the light. Their job was to hook on at their feet and to merely step out of the way on the remaining plugs until the last one was being removed. While that was being done they merely stepped out of the way over the coaming (Wines 318). Furthermore, if any cargo light used for lighting the plugs were

held by longshoremen, it could be directed as necessity required, which may or may not be said of the three lights used after the hatch was opened up and work of loading cargo commenced.

IV.

The winch driver who was in a very favorable position to observe the lighting gave testimony which clearly is to the effect that if the lights as placed did not actually afford enough light they could easily have been placed so they would have.

Winch driver Wines testified in part as follows:

“Q. Where was the light that furnished the light for that (referring to the plugs then)?

A. There was three lights altogether. When they cover up, they take all the lights and set them on deck and *have one shining on the coamings and or part of the hatch so you can put on the plugs.*” (314)

* * * * *

“Q. When you came back that night at 1 o'clock, who placed the lights for the hatch that night?

A. They were sitting there on deck, yes, since we come back from dinner * * *. *And one of them was placed so we could see to put on the plugs,* although I admit it was a little dim. It wasn't really shining down on the plugs, it was shining over the hatch. The hatch coaming is about 18 inches off the plugs.

Q. (By Mr. Cooper): That was your testimony, was it?

A. Yes, sir.” (314, 315)

This testimony shows that the longshoremen had actually used one light to light the job while they were taking off the plugs and two more were available for their use.

One of the three lights available was directed across the top of the hatch coaming. Such light was probably in the position shown on the photograph of defendant's Exhibit 6 D, attached to Appellant's opening brief. If another light

had been used by the longshoremen on the other side of the hatch, that is set up on the winch driver's platform or put on its edge as one of the witnesses testified, there would seem to be no room for doubt whatever that the square of the hatch where the work was going on would have been adequately lighted, if it was not before. And there is no evidence produced by plaintiff, on whom the burden lay, to show that it would not have. It may be noted that on this occasion the light was only a *little dim*.

Wines, who was standing at his station as winch driver near the edge of the hatch testified further:

“Q. And from there you could look down on the plugs when the plugs were in place, couldn't you?

A. Yes.

Q. And when the one plug was removed, you could look right straight down into the hold, couldn't you?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Now when you were looking down from your station, will you tell us whether or not you could see the rim or ledge, it's sometimes called, *which is level with the top of the plug*? This is sometimes called a ledge, isn't it?

A. Yes, sir.

Q. Did you see that from your position that night?

A. Yes.

Q. And could you also see the ledge, which is some 8 or 10 inches farther down from your position?

A. Yes.” (318-319)

There is no basis for the inference which Appellee would have the Court draw that the ceiling lights in the hold were intended by the shipowners to provide illumination in the hatch area where it is claimed Williams slipped.

Appellee cites no testimony to prove it. In fact the testimony is uniformly to the contrary; i.e., that the ceiling lights in the hold were for the purpose only of furnishing light to the longshoremen stowing cargo in the wings and fore and aft of the square of the hatch. Cargo lights lowered into the hold, when the work was going on of stowing cargo, furnished light in and near the square of the hatch.

It would be not a little absurd to infer that where a shipowner finds it necessary to lower powerful cargo lights to furnish light in the hold itself, where the ceiling lights are, that these small ceiling lights would furnish light to illuminate the spot where it is claimed Williams slipped several feet above the hold. And it should be pointed out here that these ceiling lights in the hold were distant horizontally an average of more than 20 feet from the opening left by removal of the key plug. (From where the lights are affixed to the top of the tween deck hold to the edge of the hatch and was from 10 to 15 feet. Another 8 feet from the side of the square of the hatch to the place where the plug had been removed make a total of 18-23 feet and more.) Also, as pointed out in Appellant's opening brief, the light coming from these small lights was directed toward the floor of the hold where the longshoremen would work in stowing cargo. It would only be a minimal amount of light which would come up through this small opening, and would be observable only in the opening itself. Furthermore, as pointed out in our brief, light coming up from below through such a small opening would not illuminate the rung at the end of the hold below the top of the coaming because that rung is

recessed in the coaming. In any event, Mr. Goedewaggen is conclusive as to the effect of these lights (331).

VI.

No decisions of this circuit indicate that the principle upon which the *Cookingham* case and numerous other cases in other circuit stands has been disapproved and it should be applied in this case.

The fundamental theory of the *Cookingham* and other cases which have applied the rule is that transitory conditions do not constitute unseaworthiness. These cases point out that historically unseaworthiness was never intended to apply to transitory unsafe conditions especially where the evidence did not show who or what caused the temporarily unsafe condition or how long it had existed. Neither *Pettersen v. Alaska Steamship Co.*, 205 F.2d 428, nor *Lahde v. Soc. Armadora*, 220 F.2d 357, both decided in this circuit, affords any reason for Appellee's assertion that the judges of this circuit have not recognized this rule. In the *Pettersen* case the stevedore furnished equipment which the ship ordinarily furnished and had the duty to furnish without defect. An inherent defect in such equipment, even though latent furnishes a basis for liability as in the case of *Sea's Shipping Co. v. Sieracki* (1946), 328 U.S. 85. In *Lahde*, libellant had already specifically alleged "unseaworthiness"; the only question was whether his pleadings were required to allege lack of knowledge. However, in *Freitas v. Pacific-Atlantic Steamship Company*, 218 F.2d 562 (9th Cir. 1955), this court cited the *Cookingham* case with apparent approval.

If the *Cookingham* rule should be applied to a case where it does not appear who caused the unseaworthiness, *a fortiori* it should be applied where it is shown without question that the transitory unsafe condition (if any existed) was caused by somebody who was not in the employ of or con-

trolled by defendant Pacific Far East Line. The work of handling cargo was being done by an independent contractor and the men, including Williams, who actually determined how the equipment, including lights, was to be rigged and arranged were in the employ of that independent contractor.

Of all situations, this is the one where the *Cookingham* rule should be applied for the reason already stated and for the further reasons (1) it was created by manner or method of performing work and (2) was transitory to the point of being almost momentary. If plaintiff's story be accepted at all, of necessity it must be based factually on the claim that after the plug was lifted out cold air rushed up, deposited frost or ice on the first rung of the ladder and at that instant Williams needed light to enable him to see the frost.

That "seaworthiness" is not synonymous with "safety" has been recognized in cases in many of the circuits, including particularly the *Hanrahan* case, decided in the Second Circuit, as long ago as the year 1919. *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951 (2d Cir. 1919).

JURY INSTRUCTIONS

Appellee's comments on requested Instructions 4A, 4B, 7A and 7B require no extended comment because the questions involved have been covered in Appellant's opening brief and to considerable extent in Appellant's argument above on the law of "transitory conditions."

Appellee has misconstrued Instruction 11A. It does not state that the cargo lights without proper arrangement constituted adequate lighting; but, on the contrary, it states that any failure of the longshoremen to place the lights properly does not constitute unseaworthiness or negligence of the ship's operator. The instruction is based on the law

established in the case of *O'Leary* and other cases cited on page 31 of Appellant's opening brief and particularly on the language of the court in *Riley, Adm. v. Agwilines, Inc.*, 240 N.Y. 402, 73 N.E. 2d 718 (1947), 1947 AMC 1038.

The instruction given by the Court did not sufficiently direct the jury's attention to the issue of lights which was one of the important issues of the case and also it purports to relieve the ship operator of liability only where the stevedore "negligence or improperly" used the equipment furnished. It does not matter what happens after proper equipment is furnished at least where there is not any opportunity, knowledge, or authority on the part of the ship operator to correct the condition.

Instructions 21A and 21B did not, as Appellee seems to think, direct the jury to find that Williams was contributorily negligent but merely established standards which the jury could apply to the facts they found in order to make a determination in respect to the evidence of contributory negligence. In addition to the cases supporting these instructions found at page 40 of Appellant's opening brief see also the case of *Crawford v. Pope & Talbot*, 256 F.2d 784 (3rd Cir. 1953), 1953 A.M.C. 1799. The instruction had to do with contributory negligence and not assumption of risk.

When the issue involved is so important to the case as it is here, it is respectfully submitted that a rule of law applicable to the precise situation should be clearly set forth in the instructions and not merely covered by a general statement of the principles involved.

Appellant's requested Instruction 26A is not, as Appellee seems to think, an application of the doctrine of the assumption of risk. It merely applies to such hazards as are inherent in the job, particularly work connected with freezer hatches. Furthermore, it is applicable only if Appellee's fall resulted solely from an inherent hazard.

Appellee was in error in his brief in respect to certain statements of fact. The errors are not of sufficient importance to put in the brief proper but are placed in Appendix A, because we feel they should not go unchallenged.

The relief requested in Libellant's Opening Brief should be granted.

Respectfully submitted,

JAY T COOPER

GEORGE L. WADDELL

DORR, COOPER & HAYS

Attorneys for Appellant.

(Appendix Follows)



APPENDIX A

Erroneous Statements of Fact in Appellee's Brief.

Several errors of fact in addition to those pointed out above were made in Appellee's brief which should not go uncorrected.

At page 2 it is stated, "There is no evidence as to where his (Williams') partner went". Mr. Wines, who was the winch driver and in an excellent position to see, testified as follows:

"Q. Now, Mr. Wines, getting back for a moment to the situation where you had seen two men down on the plugs, after you saw this object fall through the opening which is left by removing the plug, how many men were left on the plugs, if any, at that time?

A. One.

Q. One. And just prior to the falling of this object, how many men were down there on the plugs?

A. There were two men that hooked them on.

Q. Two men hooked them on. And do you remember where this remaining man was after the object had fallen through the opening, where was he standing?

A. Standing right on the left of me. (322)

Q. Standing on your left?

A. That's right.

Q. *That would be on the offshore side of the place where you had removed the plug?*

A. *Yes, sir.*

Q. *Is that the place a man usually stands after he has removed a plug?*

A. *Yes."*

It seems reasonably certain from the above that Williams' partner never left the top of the plugs but merely stepped to one side and was standing there. It is of interest that he was on the offshore side of the opening from which the plug had been removed so that he would be out of the way of the plug

when it was swung to the inshore side of the vessel and landed on deck.

It is also stated on page 2 "The method used by Williams of leaving and returning to the hatch was one constantly used by longshoremen." That means was used by longshoremen by going to and coming from work in the reefer hold. But no such custom was shown while the longshoremen were in the process of removing plugs from the reefer hatch. In that regard Mr. Walsh testified in part as follows:

"Q. What ways are there of getting into and out of a hatch, in getting onto and out of and off of plugs?

A. Well, you either climb over the coaming or down over the rail.

Q. I see. And how do you get out?

A. Same way." (271)

* * * * *

"Q. Yes, that's a pontoon. Now, will you tell us whether or not you can climb up on a pontoon to get out of that hatch?

A. Well, it is according to how active you are.

Q. Pardon me?

A. It is according to how active you are. Yes, it is done. It is only about a foot and a half, I would say—probably not much more than that. (272)

Wines testified:

"Q. And will you tell how that was done, where the men stood, and how they get out of the hatch?

A. Well, they keep, they just hooked on the plug and *step all around on the other, on the offshore side of the plug* and leave, and two men land them on the deck.

A. I see.

A. In fact, there was another hold man took this man's place and hooked the other plugs on, then after they stand off on the offshore and hooked the last plug on and hoist that over, and then put that on the deck, inshore.

Q. I see. And where do they stand when they take the last plug off on the offshore side?

A. On the deck, off of the plugs.

Q. And how do they get from the plugs onto the deck?

A. Just step off the deck, off the plugs, onto the deck.

Q. I see. Well, *you mean they stepped over the coaming?*

A. That's right." (pages 317-318)

At page 3 it is stated that there is a wire cage over the cargo lights which is "flat".

Two types of lights were put in evidence and the only testimony as to which was used was that given by Mr. Walsh, who testified that the only type of cargo light in use at the hatch was defendant's Exhibit A (261).

That type of light is shown in the photograph attached to Appellant's opening brief (plaintiff's Exhibit "6-D"). It shows that the wire cage is rounded so that the reflector in which the light bulb is located stands several inches off the level of the winch platform or deck when the light is placed face down.

No. 14707

United States
Court of Appeals
for the Ninth Circuit

HOWARD E. ROGERS, Doing Business as HOW-
ARD E. ROGERS CO.,

Appellant,

VS.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of HOWARD E. ROGERS, Etc.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
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FILED

MAY -2 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

In Bankruptcy No. 55620-BH

In the Matter of:

HOWARD E. ROGERS, dba HOWARD E.
ROGERS CO.,

Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable Judges of the District Court of
the United States for the Southern District of
California, Central Division:

The petition of Williams Farms Company, Inc., a
California Corporation, of Oxnard, California; and
Pismo-Oceano Vegetable Exchange, Inc., a Califor-
nia Corporation, of Oceano, California, and Reyes
& De Leon Packing Company, a co-partnership,
of Guadalupe, California, respectfully represents:

1. That Howard E. Rogers, dba Howard E.
Rogers Co., has had his principal place of business
at 746 South Central Avenue, Los Angeles, Califor-
nia, within the above judicial district, for a longer
portion of the six months immediately preceding the
filing of this petition than in any other judicial
district.

2. That Howard E. Rogers, dba Howard E.
Rogers Co., owes debts to the amount of \$1,000.00,
and is not a wage-earner or a farmer.

3. Your petitioners are creditors of said Howard E. Rogers, dba Howard E. Rogers Co., having provable claims against him, fixed as to liability and liquidated in amount, amounting in the [2*] aggregate, in excess of the value of securities held by them, to \$500.00. The nature and amount of your petitioners' claims are as follows:

(a) The claim of Williams Farms Company, Inc., a California Corporation, is in the sum of \$15,165.65, for produce sold and delivered by the said corporation to the said Howard E. Rogers, dba Howard E. Rogers Co., in November, 1952, at an agreed price as above set forth, no part of which has been paid; together with produce consigned to the said Howard E. Rogers, dba Howard E. Rogers Co., by said corporation, in November, 1952, at an ascertained price of \$8,231.48, no part of which has been paid.

(b) The claim of Pismo-Oceano Vegetable Exchange, Inc., a California Corporation, is in the sum of \$7,800.00, for celery sold and delivered by the said corporation to the said Howard E. Rogers, dba Howard E. Rogers Co., in November, 1952, at an agreed price as above set forth, no part of which has been paid.

(c) The claim of Reyes & De Leon Packing Company, a co-partnership consisting of Salvadore Reyes and Gabriel De Leon is in the sum of \$7,643.87, for tomatoes and lettuce sold and de-

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

livered by the said co-partnership to the said Howard E. Rogers Co., in October and November, 1952, at an agreed price as above set forth, no part of which has been paid.

4. That with four months next preceding the filing of this petition, the said Howard E. Rogers, dba Howard E. Rogers Co., committed an act of bankruptcy in that heretofore and subsequent to the first day of November, 1952, the exact date or dates of which is unknown to petitioners, while insolvent and having more than one creditor, transferred certain of his money, including the moneys received from the sale of merchandise sold to him by petitioners for which they have not been paid, the amount of which money is to your petitioners unknown but which amount was in excess of \$50,000.00, to certain of his creditors [3] whose names are unknown to petitioners, with intent to prefer said creditors over other creditors of said Howard E. Rogers, dba Howard E. Rogers Co.

That when the amount of said money so transferred as above set forth, and the names of the creditors to whom said money was transferred, are known to petitioners, petitioners will ask leave of this Honorable Court to amend their petition.

Wherefore, petitioners pray that service of this petition, with a subpoena, may be made upon said Howard E. Rogers, dba Howard E. Rogers Co., as provided in the Act of Congress relating to bank-

ruptey, and that he may be adjudged by the Court to be a bankrupt within the purview of said Act,

WILLIAMS FARMS COMPANY, INC., a California Corporation,

By /s/ PRESTON PLUMB, JR.,
Vice-President;

PISMO-OCEANO VEGETABLE EXCHANGE, INC., a California Corporation,

By /s/ KINGO KAWAOKA,
President;

REYES & DE LEON PACKING COMPANY,

By /s/ GABIEL DE LEON,
Petitioners.

G. V. WEIKERT and
ERNEST R. UTLEY,

By /s/ G. V. WEIKERT,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed December 29, 1952. [4]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 29th day of December, 1952.

Whereas, a petition was filed in this court on the 29th day of December, 1952, against Howard E. Rogers, dba Howard E. Rogers Co., alleged bankrupt above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Howard E. Rogers, dba Howard E. Rogers Co., shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ ERNEST A. TOLIN,
District Judge.

[Endorsed]: Filed December 29, 1952. [7]

In the District Court of the United States for the
Southern District of California

In Bankruptcy No. 55620-BH

In the Matter of

HOWARD E. ROGERS, dba HOWARD E.
ROGERS CO.,

Bankrupt.

Adjudication of Bankruptcy

At Los Angeles, in said District, on the 20th
day of January, 1953.

The petition of Williams Farms Company, Inc., a California corporation; Pismo-Oceano Vegetable Exchange, Inc., a California corporation; and Reyes & De Leon Packing Company, a co-partnership, filed on the 29th day of December, 1952, that Howard E. Rogers, dba Howard E. Rogers Co., be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposing interest;

It is adjudged that the said Howard E. Rogers, dba Howard E. Rogers Co., is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed January 20, 1953. [8]

[Title of District Court and Cause.]

SPECIFICATIONS OF OBJECTIONS
TO DISCHARGE

Comes now George Gardner, trustee of the estate of the above-named bankrupt, and having examined into the acts and conduct of said bankrupt and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt and that the public interest so warrants, does hereby oppose the granting to said bankrupt of a discharge from his debts and specifies the following as grounds of objection:

Specification Number I

The trustee alleges that the bankrupt obtained money and property on credit, to wit: celery, tomatoes and lettuce and other produce, sold and delivered to the bankrupt on credit by the petitioning creditors herein, to wit: Williams Farms Company, Inc., a California corporation; Pismo-Oceano Vegetable Exchange, Inc., a California corporation, and Reyes & De Leon Packing Company, a copartnership, by making and publishing and causing to be made and published a materially false statement in writing respecting the bankrupt's financial condition; that the making and publishing of said materially false statement in writing respecting the [9] bankrupt's financial condition was made to Produce Reporter Co. on or about the 31st day of July, 1952, for the purpose of establishing and maintaining credit; wherein the bankrupt listed the following:

Assets:

Cash in bank and on hand.....	\$ 8,260.15
Cash value—annuities	9,000.00
Other assets—deferred	1,363.17
Net profit, first seven months of 1952	20,775.00
Net Worth of	57,484.37

Liabilities:

Accounts payable for merchandise...	\$32,215.45
Notes payable	9,393.63

That said statement in writing was materially false in the following:

That the bankrupt, as of the date of said financial statement, to wit: July 31, 1952, had no cash in the bank or on hand, but on the contrary had a large deficit; that the item listed as "Cash value—annuities \$9000.00" did not exist, neither did the item "Other Assets—Deferred \$1,363.17" exist; that instead of the bankrupt's net profits for the first seven months of 1952 being \$20,775.00, said net profits were in fact only \$1,201.66. That the accounts payable for merchandise, at the time of the giving of said financial statement, instead of being \$32,215.45, was in fact \$192,030.95, or a total understatement of \$159,815.50. That the notes payable at the time of the giving of the false financial statement instead of being \$9,393.63, were in fact \$19,393.63, or \$10,000.00 more than as shown in said financial statement. That instead of the bankrupt having a

net worth of \$57,484.37, said bankrupt was in fact insolvent in that he had approximately \$120,586.03 more debts and obligations than [10] the total value of his assets.

That by giving said materially false statement in writing respecting the financial condition of the bankrupt, said bankrupt was able to and he did obtain credit from Williams Farms Company, Inc., a California corporation; Pismo-Oceano Vegetable Exchange, Inc., a California corporation, and Reyes & De Leon Packing Company, a copartnership, and others, who were engaged in the selling of vegetables and produce to the said bankrupt, which said credit could not have been obtained from the aforesaid creditors except by and through false and fraudulent representations made by the bankrupt in said statement in writing as aforesaid.

Specification Number II

That as an additional specification and ground for objection to bankrupt's discharge, your trustee alleges that the bankrupt has failed to explain satisfactorily losses of assets and/or deficiency of assets to meet his liabilities and more particularly has failed and refused to explain satisfactorily the disposition of moneys and merchandise coming into his hands from August, 1952, to the date of the filing of the petition in bankruptcy.

Wherefore, petitioner prays that the discharge of the bankrupt herein be denied and for such other

and further relief as the Court may deem just and proper in the premises.

/s/ GEORGE GARDNER,

Trustee;

/s/ ERNEST R. UTLEY,

Attorney for Trustee.

Duly verified.

[Endorsed]: Filed June 30, 1953, Referee. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE SPECIFICATIONS OF OB-
JECTION TO BANKRUPT'S DISCHARGE

The above-entitled matter having come on for hearing upon the Specifications of Objection to Bankrupt's Discharge on the 11th day of December, 1953, at 10 a.m. before the above-entitled Court; the trustee being represented by his counsel, Ernest R. Utley, and the bankrupt being personally present and represented by his counsel, Quittner & Stutman, and the Court having received evidence, both oral and documentary, and having heard argument of counsel and being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

The Court finds that George Gardner is the duly-qualified and acting trustee of the above-entitled

bankruptcy estate, and as such filed the specifications of objection to the discharge of the bankrupt herein.

II.

As to specification No. 1 of the aforesaid objections, [12] the Court makes the following findings of fact:

(a) That Produce Reporter Company is a national mercantile agency for the produce reporting business and allied lines; that it annually publishes a volume called the "Blue Book," in which it supplies credit information to its subscribers upon business institutions engaged in the produce business; that the said book is supplemented by credit sheets which are furnished to the subscribers to the "Blue Book" at weekly intervals; that the information which is given in the book and in the weekly credit sheets is expressed in various symbols, the meaning of which is contained in the book.

(b) That in the "Blue Book" which was published in April of 1952, or thereabouts, the following information was given with respect to the bankrupt, "25M XXX 148," which interpreted meant that the bankrupt had an estimated financial worth of \$25,000.00, that his reported methods, business reputation and credit standing were good, that the Produce Reporter Company had conflicting reports with respect to him and that the rating given to him indicated the reported general experience with him.

(c) That on or about September 15, 1952, the

bankrupt made and delivered to the Produce Reporter Company a statement in writing respecting his financial condition as of July 31, 1952; that the said statement was materially false in that it showed a net worth, or an excess of assets over liabilities in the sum of \$57,484.37, whereas in truth and in fact the bankrupt was insolvent on July 31, 1952, by reason of the fact that on said date his liabilities exceeded his assets in the approximate sum of \$120,586.03.

(d) That in its weekly credit sheet on October 24, 1952, the Produce Reporter Company gave the following information with respect to the bankrupt: “(69) (144) XXX 148,” [13] which interpreted meant that its reported previous report should be revised to read that it reported no definite estimate as to the bankrupt’s financial worth, that his reported methods, business reputation and credit standing were good, that the Produce Reporter Company had conflicting reports with respect to him, and that the rating given to him indicated the reported general experience with him.

(e) That among the symbols used by the Produce Reporter Company is one consisting of the numerals “110,” which interpreted means “Reported insolvent.”

(f) That Williams Farms Company, Inc., a California corporation, was a subscriber to the aforesaid “Blue Book,” and that it received the aforesaid volume which was published in April of 1952, or

thereabouts, and the aforesaid weekly credit sheet of October 24, 1952; that it noted the information given in the said volume and in the said credit sheet with respect to the bankrupt; that in November of 1952, and in reliance upon the said information, it sold and delivered to the bankrupt on credit \$25,000.00 worth of fresh carrots in crates.

III.

As to specification No. 2 of the aforesaid objections, the Court finds that no proof in support of said specification has been offered and that the truth of the allegations therein contained has not been established.

Conclusions of Law

I.

That the objector has shown to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt obtained property on credit from Williams Farms Company, Inc., by making and delivering the aforesaid materially false statement in writing respecting his [14] financial condition, in the manner as aforesaid, in that there are reasonable grounds for believing:

(a) That the Produce Reporter Company relied upon the said false statement in furnishing the information with respect to the bankrupt which was contained in its aforesaid weekly credit sheet of October 24, 1952;

(b) That if the said statement had been true, the said Company in its said weekly credit sheet

would have furnished information to the effect that the bankrupt was insolvent; and

(c) That in such event the Williams Farms Company would not have sold and delivered the aforesaid property to the bankrupt on credit as aforesaid.

II.

That the bankrupt has not sustained the burden of proving that he did not obtain property or credit in the manner as aforesaid and that accordingly he has committed an act which prevents his discharge in this bankruptcy proceeding.

III.

That specification No. 1 of the objections has been sustained and that specification No. 2 thereof should be dismissed.

IV.

That the bankrupt's discharge should be denied.

Dated: October 21, 1954.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed October 21, 1954, Referee. [15]

[Title of District Court and Cause.]

ORDER DENYING DISCHARGE
OF BANKRUPT

At Los Angeles, in said district, on the 21st day of October, 1954.

It appearing that Howard E. Rogers, dba Howard E. Rogers Co., of Los Angeles, in the County of Los Angeles, State of California, was duly adjudged a bankrupt on a petition filed against him on the 29th day of December, 1952; and

It further appearing that, after due notice by mail, Specifications of Objection to the discharge of said bankrupt were filed by the Trustee within the time fixed by the Court; that the same were duly heard and Findings of Fact and Conclusions of Law entered thereon, and good cause appearing therefor,

It Is Ordered that Specification No. I be and the same is hereby sustained.

It Is Further Ordered that Specification No. II be and the same is hereby dismissed.

It Is Further Ordered that the bankrupt's discharge be and the same is hereby denied.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed October 21, 1954. [16]

[Title of District Court and Cause.]

PETITION OF BANKRUPT FOR REVIEW
OF ORDER OF REFEREE DENYING DIS-
CHARGE IN BANKRUPTCY

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

The petition of Howard E. Rogers, doing business
as Howard E. Rogers Co., respectfully represents:

I.

That petitioner is aggrieved by that Order of the
Honorable Benno M. Brink, Referee in Bank-
ruptcy, denying discharge of bankrupt, dated Octo-
ber 21, 1954, a true copy of which is attached hereto
as Exhibit "A."

II.

That there is, and could be, no Finding of Fact
that Williams Farms Company, Inc., in extending
credit, relied upon the financial statement issued by
the bankrupt, and absent such a finding the Referee
erred in sustaining Specification No. I of the Objec-
tions to Discharge.

III.

The Referee erred in making Conclusions of Law
I (a) in that there is no evidence that Produce Re-
porter Company relied upon [17] the financial state-
ment of the bankrupt in making its credit rating of
him in the credit sheet of October 24, 1952.

IV.

The Referee erred in making Conclusions of Law
I (b) and I (c) with respect to the action which

“would have” been taken by Produce Reporter Company and Williams Farms Company, Inc., had an accurate financial statement been issued by the bankrupt. There is no evidence in the record to sustain said Conclusions and said Conclusions are speculative.

V.

The Referee erred in refusing petitioner's request to make the following Findings of Fact:

“1. Nothing in the financial rating given by Produce Reporter Company to the bankrupt indicated that the bankrupt had furnished any financial statement.

“2. There is no evidence in the record concerning the basis on which Produce Reporter Company gave the bankrupt his financial rating and there is no evidence as to what rating would have been given the bankrupt if an accurate financial statement had been rendered.

“3. The bankrupt's rating of October 24, 1952, contained no indication of, or reference to, his net worth.

“4. Produce Reporter Company did not believe or rely on the bankrupt's financial statement in preparing its financial rating of him of October 24, 1952.

“5. At the time of extending credit to the bankrupt, Williams Farms Company, Inc., did not know that the bankrupt had issued a financial statement to Produce Reporter Company, and did not discover

said fact until after bankruptcy ensued. Williams Farms Company had no indication from the financial rating given the bankrupt by Produce Reporter Company that a financial statement had been issued, nor did said rating indicate to Williams Farms [18] Company the net worth of the bankrupt.

“6. Williams Farms Company did not rely in extending credit to the bankrupt on the financial statement furnished by him to Produce Reporter Company.”

Wherefore, petitioner prays that said Order Denying Discharge be reviewed by a Judge in accordance with the provisions of the Bankruptcy Act, that said Order be reversed, that petitioner be granted his discharge in bankruptcy, and that petitioner have such other and further relief as is just.

Dated this 28th day of October, 1954.

HOWARD E. ROGERS, Doing Business as HOW-
E. ROGERS CO.,

By QUITTNER AND STUTMAN,
Attorneys for Bankrupt.

By /s/ GEORGE M. TREISTER.
Affidavit of Service by Mail attached.

[Endorsed]: Filed November 1, 1954, [19] Ref-
eree.

In the United States District Court, Southern
District of California, Central Division

In Bankruptcy No. 55,620-BH

In the Matter of:

HOWARD E. ROGERS, d/b/a HOWARD E.
ROGERS CO.,

Bankrupt.

ORDER AFFIRMING ORDER OF THE REF-
EREE DENYING BANKRUPT A DIS-
CHARGE

The above-entitled matter came on for hearing on March 22, 1954, upon the petition of the bankrupt, Howard E. Rogers, to review an order of the Honorable Benno M. Brink, Referee in Bankruptcy, entered October 21, 1954, sustaining a specification of objection to the bankrupt's discharge and denying the bankrupt a discharge, and

The bankrupt being represented by his attorneys, Quittner and Stutman, appearing by George Treister, and the trustee being represented by his attorney, Ernest R. Utley, and

The parties having filed points and authorities setting forth their arguments and after oral argument, the matter was submitted to the Court for its decision, and the Court being fully advised in the premises, and the Court having on February 10th, 1955, announced its decision that the order of the Referee of October 21, 1954, be affirmed,

Now, Therefore, the Court hereby adopts the findings of fact and conclusions of law of the Referee made October 21, 1954. [30]

It Is Ordered, Adjudged and Decreed that the petition of the bankrupt, Howard E. Rogers, for a review of the aforesaid order of the Referee be denied, and

It Is Further Ordered, Adjudged and Decreed that the order of the Referee dated October 21, 1954, be, and it hereby is, affirmed.

Dated this 17th day of February, 1955.

/s/ BEN HARRISON,
U. S. District Judge.

Approved as to Form:

QUITTNER & STUTMAN,
By /s/ GEORGE M. TREISTER,
Attorneys for Bankrupt.

[Endorsed]: Filed February 17, 1955.

Judgment docketed and entered February 18, 1955. [31]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Howard E. Rogers, dba Howard E. Rogers Co., the above-named bank-

rupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Affirming Order of the Referee Denying Bankrupt a Discharge dated February 18, 1955.

Dated: February 23, 1955.

QUITTNER AND STUTMAN,
Attorneys for Bankrupt.

By /s/ GEORGE M. TREISTER.

[Endorsed]: Filed March 2, 1955. [32]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Comes Now Appellant and, pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, furnishes the following Statement of Points on Appeal:

No creditor relied in extending credit upon the financial statement of the bankrupt and, in the absence of such reliance, there is no basis for denying the bankrupt a discharge under Section 14 (c) (3) of the Bankruptcy Act.

Respectfully submitted,

QUITTNER AND STUTMAN,
Attorneys for Appellant.

By /s/ GEORGE M. TREISTER.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 2, 1955. [34]

In the United States District Court, Southern
District of California, Central Division

In Bankruptcy No. 55,620-BH

In the Matter of:

HOWARD E. ROGERS, d/b/a HOWARD E.
ROGERS CO.,

Bankrupt.

Before: The Honorable Benno M. Brink,
Referee in Bankruptcy.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

At Hearing on Objections to Discharge

December 11, 1953

Appearances:

For George Gardner, Trustee in Bankruptcy,
Objector:

ERNEST R. UTLEY, ESQ.,
417 South Hill Street,
Los Angeles, California.

For the Bankrupt:

MESSRS. QUITTNER & STUTMAN, by
FRANCIS F. QUITTNER, ESQ., and
GEORGE M. TREISTER, ESQ.,
639 South Spring Street,
Los Angeles, California.

Friday, December 11, 1953—10 A.M.

The Referee: Howard E. Rogers.

Mr. Utley: Ready.

Mr. Quittner: Ready for the Bankrupt.

The Referee: All right. These are the Specifications of Objections to Discharge filed by the Trustee. We have two Specifications; one based upon an alleged false financial statement; the other upon the failure to satisfactorily explain the loss of assets. You may proceed, gentlemen.

Mr. Utley: Will you take the stand, Mr. Gordon?

RAYMOND W. GORDON

the witness, having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: What is your name, sir?

A. Raymond W. Gordon.

The Referee: Proceed, Mr. Utley.

Direct Examination

By Mr. Utley:

Q. Mr. Gordon, give us your address, please.

A. 247 Wholesale Terminal Building, Los Angeles.

Q. And what is the nature of your business or your occupation?

A. I am with the Produce Reporter Company, which is a national mercantile agency for the produce reporting business and allied lines. [2*]

Q. And how long have you been so engaged?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Raymond W. Gordon.)

A. Approximately five years.

Q. Have you been located here in Los Angeles with offices here during that entire time?

A. Yes.

Q. Did your agency have occasion to call upon Howard E. Rogers during the year 1942 for a financial statement? A. Do you mean 1942?

Q. No, I mean 1952. Pardon me. A. Yes.

Q. Have you that statement with you?

A. Yes, and I would like to explain here that I think it is the understanding that I have the original and that it must go back to the company, and I have an exact photostatic copy of it.

The Referee: Very well.

Mr. Utley: Have you seen it, or do you want to see it, Mr. Quittner?

Mr. Quittner: No, I haven't seen it, but I have no objection.

The Referee: Do you want to stipulate that statement was given by the bankrupt to the Produce Reporter Company?

Mr. Quittner: No; all I stipulate to so far is that he may use the copy instead of the original.

Q. (By Mr. Utley): Do you know about what date you received a copy of this statement? [3]

A. Yes, September 15, 1952.

Q. Is this in the same condition it was in when the Produce Reporter Company received it here in Los Angeles?

A. Yes, except for the pencil figures in there at the top, I would say it is the same.

(Testimony of Raymond W. Gordon.)

Q. All the figures other than the pencil figures were on it at the time you received the copy of it?

A. Yes.

Mr. Utley: Do you stipulate the signature on this statement is that of Howard E. Rogers?

Mr. Quittner: I assume so, but let me ask him. (Pause.) Yes, we so stipulate.

Mr. Utley: We would like to offer this copy in evidence as the Trustee's Exhibit No. 1, offering the copy in lieu of the original.

The Referee: It is received as Objector's Exhibit No. 1.

Q. (By Mr. Utley): Mr. Gordon, when the Produce Reporter Company receives such a statement what do they do with that statement?

A. The statement is analyzed and the assets and liabilities checked and verified as much as can be done and, of course, the statement is retained for the financial condition and information and net worth.

Q. Is that put in the form of a book?

A. It is published first in the Weekly Credit Sheet, [4] and then carried into the next Credit Book that is printed.

Q. Does the Produce Reporter Company have a Weekly Credit Sheet? A. Yes.

Q. Does that go out to all of your subscribers?

A. Yes, it does.

Q. Does it have any Credit Report?

A. Yes.

Q. Does that go out to all your subscribers?

(Testimony of Raymond W. Gordon.)

A. Yes, and that is a consolidation of these Weekly Credit Sheets, and at the beginning of the year the condition is put into the Blue Book itself, and prior to this time we have always published that book April 1st.

Q. After the book is published in a given year the credit rating of each person named therein is followed through in these Weekly Credit Sheets to your subscribers, and show any change, if there is any change? A. Yes.

Q. After you received this financial statement from Howard E. Rogers was that information conveyed on to your subscribers? A. Yes.

Q. In what manner?

A. I presume in that Mr. Rogers having been in business several years, and he would have a credit rating and it would be put in the Weekly Credit Sheet. [5]

The Referee: That is a presumption. Haven't you the actual record of that?

Q. (By Mr. Utley): Have you that record?

A. No, but that is in our record of our company, but I don't have it with me.

Q. Do you know what the rating of Mr. Rogers was pursuant to this financial statement you have just identified? A. Yes.

Q. What was it? A. It was 25M.

Q. What does that mean? A. \$25,000.

Mr. Quittner: I am not clear on that; the question is not clear. When you say the "rating" do

(Testimony of Raymond W. Gordon.)

you mean the rating after that statement was issued?

Mr. Utley: Yes.

Mr. Quittner: Did you understand that, Mr. Gordon?

The Witness: No, I didn't, but I believe the 1952 Blue Book published in April carried the rating of 25M, XXX 148.

The Referee: We have this evidence from his memory only.

Q. (By Mr. Utley): Did you bring that rating record with you? A. No.

Q. Do you have copies of that? [6]

A. Yes.

Mr. Quittner: We have copies of them that we would be glad to furnish you.

The Referee: I didn't get the date when your company received this copy, the report introduced as Objector's Exhibit No. 1.

The Witness: September 15th.

The Referee: What year?

The Witness: 1952.

The Referee: What does 25M indicate?

The Witness: That indicates the collectible net worth of \$25,000.

The Referee: What does the 3 X's mean?

The Witness: That means good ability and integrity.

The Referee: What does the 148 mean?

The Witness: I can't give you the exact words, but it is in the book and means confirmed reports.

(Testimony of Raymond W. Gordon.)

The Referee: Confirmed reports as to what?

The Witness: It might mean that if we had 20 references from the individual, maybe two or three of them claimed trouble as to slow pay, or something not delivered as he stated it would be, but it means good.

The Referee: Go ahead, Mr. Utley.

Mr. Utley: Now, I would like to have the witness produce these Weekly Credit Sheets or the Quarterly Sheets, or both. Mr. Quittner says he has them, and I am willing to [7] take them——

Mr. Quittner: No, I am not supposed to produce them for you.

The Referee: You allege, Mr. Utley, that certain specific creditors extended credit in reliance on this statement?

Mr. Utley: Yes.

The Referee: Have you those creditors here?

Mr. Utley: Yes.

The Referee: Have they those records?

Mr. Utley: They were subscribers to the Blue Book, and they got the Weekly Sheets and Quarterly Sheets.

The Referee: If they have the Weekly Statements on which they relied, but do not have them with them, then we should have them in the record.

Mr. Utley: I thought this witness had been told to produce them and I thought he would.

The Referee: This is the time for the trial on the objections to the discharge.

(Testimony of Raymond W. Gordon.)

Mr. Utley: I will ask permission to go ahead and we will try to produce them.

The Referee: This is the time.

Mr. Quittner: Does the record show a Subpoena Duces Tecum to produce those documents?

The Referee: There is no subpoena in the file.

Mr. Quittner: If the creditors have the information [8] on which they relied, I prefer that Mr. Utley take them and show them to this witness and ask him if they are his Weekly Credit Reports, and I will oppose any motion for continuance for that purpose.

Q. (By Mr. Utley): How far is your office from this court, or how long will it take to produce them?

A. A half or three-quarters of an hour.

Mr. Utley: I think we can get them here and finish the case at this hearing.

The Referee: What else have you, then, for this witness?

Mr. Utley: That will be all at this time.

Mr. Quittner: While I am not going to cross-examine him now, but I intend to call him later.

The Referee: Very well, the cross-examination, if any, will be held in abeyance. Call your next witness.

Mr. Utley: I will call Mr. Mulherin.

T. M. MULHERIN

the witness, having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: Your name, sir?

A. T. M. Mulherin.

Direct Examination

By Mr. Utley:

Q. What is your business or occupation?

A. I am a certified public accountant. [9]

Q. How long have you been so engaged?

A. Since the first of this year.

Q. What was your business prior to that time?

A. I was a Special Agent of the FBI.

Q. For how long? A. For 24 years.

Q. Were you engaged in accounting work with the FBI? A. Yes, I was.

Q. You were employed by the Trustee in this Matter to make an audit of the books and records of the bankrupt here, weren't you?

A. I was engaged by the Trustee to make an examination for the purpose specified in the order.

Q. I show you Trustee's Exhibit No. 1; have you seen that before?

A. I have seen one which appears to have been identical with this particular statement.

Q. Did you use that statement in any way in making your audit in this matter or in connection with your audit in this matter? A. Yes, I did.

Q. For what purpose?

A. For the purpose of comparing what the state-

(Testimony of T. M. Mulherin.)

ment showed as to the condition of the Howard E. Rogers Company with what the books and records of that company indicated as of the date of the statement. [10]

Q. Have you filed with this Court a report of your audit? A. Yes, I have.

Q. On what pages of that is reference made to this statement, this financial statement?

A. On pages 5, 6 and 7 of my report of July 19, 1953.

The Referee: What date?

The Witness: June 19, 1953—I beg your pardon.

The Referee: There is an instrument in the file, filed June 24, 1953, dated June 19, 1953, signed “T. M. Mulherin” but it is not in evidence.

Q. (By Mr. Utley): From what books or records or source did you get the information contained in your audit on pages 5, 6 and 7 of that audit?

A. Everything on pages 5, 6 and 7, the basic information is contained in the ledger of the books before you, and this one was the financial statement.

Mr. Quittner: To save encumbering the record I have no objection to the Court using the summary prepared by this auditor from the books of account.

The Referee: I can’t look at it until it is in evidence.

Q. (By Mr. Utley): Did you compare the books and records of Howard E. Rogers Company with the figures shown in the financial statement, to show whether or not the books and records reflected the figures as shown by the financial [11] statement?

(Testimony of T. M. Mulherin.)

A. Yes.

Q. And what did you find?

Mr. Quittner: Objected to, no proper foundation laid for the introduction of any evidence to test the truth or falsity of this financial statement until it has been shown that somebody has relied on the statement and that it is material.

Mr. Utley: I want to get through with Mr. Mulherin and let him go.

The Referee: You called him out of order?

Mr. Utley: Yes.

The Referee: Is this information in the written report?

Mr. Utley: Yes, it is, and at this time we offer in evidence pages 5, 6 and 7 of Mr. Mulherin's report pertaining to the financial statement in question.

Mr. Quittner: May it be stipulated that I object and reserve the right to move to strike all these questions and answers?

Mr. Utley: Yes.

The Referee: Received as Objector's Exhibit No. 2, pages 5, 6 and 7 of the Report of T. M. Mulherin, filed June 24, 1953, by reference. Proceed.

Q. (By Mr. Utley): Now, Mr. Mulherin, turning to page 6 of your report, you show certain items under the heading [12] "Assets" and in the next column you show: "Per Statement to Blue Book"; and in the next column you show "Per Books"; then under the word "Statement" you have two headings, one: "Understatement" and another

(Testimony of T. M. Mulherin.)

“Overstatement.” Will you explain what is indicated by the figures under the heading “Assets”?

The Referee: I think it explains itself.

Mr. Quittner: Are not the figures themselves self-explanatory?

Mr. Uteley: I don't want any question raised about it.

The Referee: I will give you my analysis of it, and will ask the witness: On an unnumbered page between pages 5 and 7, the one which at the top on the left end shows “—6—” he makes a comparison between the statement which is Objector's Exhibit 1 and the information which he found on the books with reference to several items of assets and liabilities shown on the statement by page 7. However, to this time I have no information as to the date of the statement itself; I have the inference that it was received by somebody on September 15, 1952.

Mr. Uteley: The statement shows it was made as of July 31, 1952.

The Referee: Yes, but the statement bears no date, but says: “Financial Condition on 7-31-1952,” and that is established now, and the statement shows “Total Assets \$143,172.94,” and the books show \$137,532.33; and then [13] Mr. Mulherin shows the “Understatement” and “Overstatement” of each of the items of assets, and approximately there was an overstatement of \$4,500.00. Now, on the liability side the statement shows a total of \$143,000 odd dollars, including a net worth of some \$57,000 odd dollars. The books, according to Mr. Mulherin's

(Testimony of T. M. Mulherin.)

analysis, show a total on the liability side of \$137,000 odd dollars including deficit in the net worth item of some \$120,000 odd dollars, and I think the statement is clear. The principal item, of course, that we may be concerned with is that of Accounts Payable for Merchandise, where the financial statement, which is Objector's Exhibit No. 1 shows \$32,000 odd dollars, and Mr. Mulherin's report shows that on the books that item was \$192,000 odd dollars.

Q. (By Mr. Utley): Mr. Mulherin, in one item opposite "Cash in Bank & on Hand" you have \$8,260.15 and "Per Books \$38,085.95." What does that mean?

A. That means checks had been issued in excess of that to the amount of \$38,085.95 on July 31, 1952.

Q. Under "Liabilities" I think it is, "Net Worth \$120,586.03," what does that mean?

A. As his Honor stated, that indicates an investment, according to the books.

Mr. Utley: I believe that is all.

The Referee: Do you desire to cross-examine at this time? [14]

Mr. Quittner: No cross-examination.

The Referee: May Mr. Mulherin be excused?

Mr. Quittner: Yes, as far as I am concerned.

Mr. Utley: Yes.

The Referee: Call your next witness.

Mr. Utley: I will call Mr. Miller.

J. E. MILLER

the witness, having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: What is your name, sir?

A. J. E. Miller.

Direct Examination

By Mr. Utley:

Q. What is your address? Where do you live?

A. My residence?

Q. Yes.

A. 714 Devonshire, Oxnard, California.

Q. What is the nature of your business or occupation?

A. I am Sales Manager for Williams Farms Company, Inc.

Q. How long have you been so engaged?

A. Approximately four years.

Q. Do you know Howard E. Rogers?

A. Yes.

Q. Did you know him during the year [14-a] 1952?

A. Yes, I did.

Q. Incidentally, Williams Farms Company with which you are associated is the same Williams Farms Company that was one of the Petitioning Creditors in this proceeding?

A. Yes.

Q. Now, did you have any business transaction or transactions with Howard E. Rogers in the year 1952?

A. Yes.

Q. About when in that year?

(Testimony of J. E. Miller.)

A. Well, there would be some business dealings during the spring of 1952.

Q. Approximately—

A. Approximately in the months of April or May.

Q. Did you have any business transaction with him after September, 1952? A. Yes, I did.

Q. Approximately when was that?

A. Between the dates of November 1 and November 20, 1952.

Q. And what was the nature of the business you had with him then?

A. Between November 1 and 20, 1952, I, as Sales Manager of my company, sold to Howard E. Rogers Company a large volume of fresh carrots in crates.

Q. What was the approximate amount of that sale? A. You mean the total value? [15]

Q. Yes.

A. Between \$25,000 and \$30,000 market value.

Q. Is your company a subscriber to the Blue Book Reporter Company? A. Yes.

Q. Did they have that book at the time?

A. Yes.

Q. Do you know whether or not they had weekly financial reports of the Blue Book Reporter Company or Produce Reporter Company?

A. Yes, we receive them weekly.

Q. Do you examine them regularly when you receive them? A. Yes.

Q. Do you receive a Quarterly from the Produce Reporter Company, Quarterly Reports?

(Testimony of J. E. Miller.)

A. Yes.

Q. Do you examine them also? A. Yes.

Q. State whether or not you examined any of these documents at the time you extended the credit in November, 1952, to Howard E. Rogers Company?

Mr. Quittner: There is no foundation that there is any such document, yet.

The Referee: Proceed.

Mr. Quittner: We have our own file on these Reports. [16]

Q. (By Mr. Utley): Have you that copy with you, Mr. Miller?

A. For clarification, if need be, the Blue Book is a yearly publication and it is returned to the Reporter Company when the new one is published, and we have no back copy, but only the new one for the year 1953 on hand.

The Referee: When is the 1952 published?

Mr. Quittner: He might know, but it was April, 1952.

Mr. Utley: The witness testified as to the use of the Weekly Reports and Quarterly Reports in relation to showing any changes.

The Referee: What about those Quarterly Reports; were they returned also?

The Witness: They were and are used as supplements and the Quarterly Reports are destroyed, they being of no use when the new book comes out, because it includes all past information.

The Referee: I don't think you can go any

(Testimony of J. E. Miller.)

farther with this witness at this time. The question will arise as to whether or not you can use with this witness some copy of a Report we don't have, if there is any. Have you any other witness?

Mr. Utley: Yes, I have another witness here who dealt with Mr. Rogers and whose testimony will be similar to this witness. That is all at this time until the witness returns with that information. [17]

Mr. Quittner: If, as and when I am forced to call him as a witness I have the Reports issued. I don't know what they have seen. There might be some mistake in parts, but if we have to go forward I have in our file the copies of those reports, and I don't know whether they are the same ones other people looked at, and there are at times misleading matter in them.

Mr. Utley: I don't know how we are going to prove it other than through the witness Gordon. I think I can show by him they only printed one sheet of Weekly Reports each week and sent them out.

The Referee: Do you want to go into the second Specification in the meantime?

Mr. Utley: No, your Honor, I am not going to proceed on that, but I am relying on the first Specification.

Mr. Quittner: I have no objection to your using these documents as to putting them into evidence as copies of what he has in his file.

The Referee: It is quite clear that the Blue Book of 1952 is not material here and we are limited to

what he referred to as Quarterly Reports, and the statements.

Mr. Utley: Am I right in this, Mr. Gordon, when the Blue Book is returned if there is any change then in the rating of the persons named therein that is shown in the Weekly and Quarterly Sheets and there is no mention of it?

Mr. Gordon: That is correct. First of all the Weekly [18] Credit Sheets and the Quarterly Sheets or copies of them go into the quarter.

Mr. Quittner: As to that issue I will agree with Mr. Utley if he can produce proper evidence that the 1952 Blue Book of April is material to show the material change in the condition of the bankrupt in this case from the time of the Blue Book to the Weekly Supplement, if he can get it in properly in the Blue Book.

The Referee: Are you going to make that available to Mr. Utley?

Mr. Quittner: That instrument, yes, the 1952 Blue Book and two Weekly Sheets issued October 24, 1952, and October 31, 1952, showing change in condition, but I am only stipulating that these are duplicate copies of the Produce Reporter Company.

The Referee: All right.

Mr. Utley: Mr. Gordon, will you go back on the witness stand, please.

RAYMOND W. GORDON

the witness, resumed the witness stand, and having been previously duly sworn by said Referee in Bankruptcy, testified further as follows:

Direct Examination
(Resumed)

By Mr. Utley:

Q. I show you what purports to be the Produce Reporter Company Blue Book of 1952, consisting of one page where the [19] name of Howard Rogers appears. A. Yes.

Q. Will you circle with a red pencil the rating there? A. Yes.

Q. Does that show the rating of Howard E. Rogers Company? A. Yes, it does.

Q. As of what date?

A. The book was published in 1952, and if there were no changes thereafter, why, this is it.

Q. And it does show the rating? A. Yes.

Q. I show you what purports to be Produce Reporter Company Weekly Credit Sheet, which has the date "October 24, 1952," on it. A. Yes.

Q. Would there have been earlier Weekly Sheets than October 24, 1952? A. Yes.

Q. On September 15, 1952, if there was any change in the Howard E. Rogers Company rating when would that change be?

A. It would be the following Friday, as our mail goes to members every Friday.

(Testimony of Raymond W. Gordon.)

Mr. Quittner: Those were the only two changes made. [20]

Mr. Utley: You are stipulating there were no other changes as to Howard E. Rogers Company except as to what appear on this?

Mr. Quittner: Mr. Rogers says there were no other changes, and we so stipulate.

Q. (By Mr. Utley): Is there a change in the Weekly Sheet of October 24, 1952?

A. Yes, there is.

Q. And will you circle that with a red pencil?

A. Yes.

Q. Is there a change in the Weekly Sheet of October 31, 1952?

A. Well, it merely shows a change of address, but doesn't indicate any change in his rating.

Examination

By the Referee:

Q. On the Weekly Credit Sheet of October 24, 1952, the figure (69) and the figure (144) appear in parentheses, and then follows XXX148.

A. Yes.

Q. What does that indicate?

A. The (69) indicates reported previously to have been paid but revised to read as 69 shows, and it would be as 144; the XXX148—the 144 means reported no definite estimate as to financial worth; that is the 144. The three X rating is generally received as good in the trade, credit rating and ability;

(Testimony of Raymond W. Gordon.)

and the 148 and the 3X means general [21] appearance good with maybe some conflicting reports.

Q. If your company had known at the time this Weekly Sheet of October 24, 1952, was published that Howard E. Rogers Company was insolvent would you have rated him as good?

Mr. Quittner: Just a minute. We are assuming facts here that are certainly not in evidence, and there has been no foundation laid for that question.

The Referee: The evidence of Mr. Mulherin shows a state of insolvency at that time.

Do you object to the question?

Mr. Quittner: Yes. He didn't make these ratings.

The Referee: The objection is sustained.

Direct Examination

(Resumed)

By Mr. Utley:

Q. Do you know who made these ratings?

A. Yes; they are made in our Home Office, and I had nothing to do with that.

Q. Where is the Produce Reporter Company's home office? A. It is in Wheaton, Illinois.

Q. Do you know the page in the Blue Book showing what the various X's and figures mean?

A. Yes.

Q. Will you turn to that page?

A. Yes. [22]

Q. What page is that on?

A. I don't believe it is numbered, but it is the first page in the Blue Book.

(Testimony of Raymond W. Gordon.)

Q. That refers to the X's, doesn't it?

A. Yes.

Q. Indicating what the different number of X's show and mean? A. Yes, it reports that.

Q. Where do you find the information on the figures 144 and 148?

A. On the other side of the same page.

Q. Do you know upon what the rating as shown in that Weekly Sheet was based?

A. No, I do not, because the ratings are all made and changed in Wheaton, Illinois, and we receive a copy of these reports.

Mr. Utley: May it please the Court, we would like to offer in evidence pages 1 and 2 of the Blue Book, and the portion which Mr. Gordon marked with red pencil; I offer that portion of the Blue Book in evidence as Objector's Exhibit No. 3.

The Referee: You are offering what?

Mr. Utley: The front part of this page showing the marks and what they mean, and the X's here.

The Referee: You are offering a page from the 1952 Fruit and Produce Credit Book, issued by Produce Reporter [23] Company, which is the first page in the book, and you are offering both sides of that page?

Mr. Utley: Yes.

The Referee: The front side—for the purpose of identification—reads, at the top thereof:

“When these numerals appear in the ‘X’ Rating Column they are to be interpreted as below.”

And the reverse side of it reads:

(Testimony of Raymond W. Gordon.)

“See Preceding Page for Key to Numerals used in ‘X’ Column, and Credit Sheets.”

Mr. Quittner: I have torn out a copy from another book, if we can substitute that.

The Referee: I didn’t intend to tear it out. Is it stipulated that it is marked in pen and ink at the top of the page: “From Howard Rogers Blue Book” and may be used?

Mr. Utley: That is the same year?

Mr. Quittner: Yes.

The Referee: Is there any objection to this being offered?

Mr. Quittner: No.

The Referee: This is Objector’s Exhibit No. 3.

Mr. Utley: And we offer from that same book the rating, and it is short and we can read it into the record.

The Referee: Is there any objection to that?

Mr. Quittner: No, I have no objection to that.

The Referee: There is received into evidence by the [24] reading thereof into the record a portion of page 103 of the 1952 Fruit and Produce Credit Book, Shipper’s Edition, issued by Produce Reporter Company, which extract reads as follows:

“Rogers, Howard E. Co. (Howard E. Rogers, Prop.) 246 Wholesale Terminal Building; Phone: VAndike 4036; Long Distance TUCKER 7566; Nite GRANITE 1862 or CITRUS 3-4864, Long Distance answered by Rogers, Roberts or Nelson. Operate Seasonal Offices at El Centro, Santa Maria & Cutler. HERCO & R Brands. Drafts: Bank of America.”

(Testimony of Raymond W. Gordon.)

Now, Mr. Reporter, the next thing is a little complicated; it is:

“BBuyBR 500 TomLetPcCt”

“PIMeOGcSqNecCabRomaine”

“PpCelYbCkGreenOPPsA”

“AvBnBt.....25M XXX148.”

Mr. Utley: Now, Mr. Quittner, you offer to stipulate that any of the Weekly Credit Sheets after September 15th and prior to November do not carry the bankrupt's names except the two Weekly Credit Sheets you have mentioned?

Mr. Quittner: Yes.

Mr. Utley: I accept that stipulation.

Q. (By Mr. Utley): You have circled in red pencil on the Weekly Credit Sheets of October 24, 1952, the name of Rogers, Howard E. Company?

A. Yes.

Q. And you have explained what those figures mean? [25]

A. Yes.

Q. And you have circled the name Rogers, Howard E. Company on the October 31st, 1952 Weekly Credit Sheet?

A. Yes.

Q. And I believe you stated that was only a change of address?

A. Yes.

Q. Does your Company print more than one sheet of Weekly Credit Sheets each week?

A. Yes.

Q. And are they the same so far as you know?

A. Yes.

(Testimony of Raymond W. Gordon.)

Q. That goes to all the States in the Union?

A. Yes, to every member in the States, and in Canada.

Mr. Utley: I would like to offer these two Weekly Credit Sheets in evidence.

Mr. Quittner: I have no objection to their going in as copies sent out by his Company, which are in our file, and reserve my motion to strike unless it is shown it was communicated to these creditors and that they relied on it.

The Referee: Objector's Exhibit No. 4.

Mr. Utley: That is all.

The Referee: I show you Objector's Exhibit 3; where on that Exhibit 3 will we find an explanation of how you term 25M?

The Witness: It is shown right here on this Sheet, 1M, 5M, 10M. [26]

The Referee: You are pointing out a portion of the Sheet captioned "Estimated Financial Worth," referring to 4?

The Witness: Yes, I am.

The Referee: All right, Mr. Quittner; you may cross-examine.

Mr. Quittner: May I have the exhibits?

The Referee: Yes.

(Testimony of Raymond W. Gordon.)

Cross-Examination

By Mr. Quitner:

Q. What is the number of the stipulated entry the Court read "Howard Rogers, 25M"?

The Referee: That is not an exhibit.

Q. (By Mr. Quittnr): Referring to the statement read into evidence by the Court, and which was obtained from the 1952 Blue Book, page 103 as to Howard E. Rogers, I understood the 25M meant he had a \$25,000.00 financial rating?

A. That term is that he has that net worth.

Q. It showed he had a net worth of \$25,000.00?

A. Yes.

Q. When the Weekly Letters or Reports were issued on October 24, 1952, and the 69 appeared, and the 25M was omitted; what is your interpretation of the omission of the 25M?

A. I had nothing to do with that.

Q. You did not?

A. No; that was all done back at Wheaton, Illinois, [27] and in my opinion I would say that they found he didn't have that net worth, or maybe he had a bad deal the previous year.

Q. The omission of the 25M in the Weekly Letter means the removal of that rating? A. Yes.

Q. Again calling your attention to Objector's Exhibit No. 4 and referring to the code numbers, do any of those code numbers in any way indicate that a financial statement was ever issued on July 31st? A. No.

(Testimony of Raymond W. Gordon.)

Q. Anybody looking at those code numbers wouldn't even know that; is that right?

A. That is right.

Q. And in preparing the code numbers there is one numbered 65; that doesn't appear in there?

A. I don't see it.

Q. And 65 under Exhibit No. 3 shows what?

A. "Financial Statement Received."

Q. There is no indication, whatever, of 65 in there? A. No.

Q. And those other numbers were in no way related to the financial statement of November?

A. No, sir.

Mr. Quittner: That is all. [28]

Redirect Examination

By Mr. Utley:

Q. If your company received a financial statement on September 15th that would appear in the following Weekly Bulletin, would it not?

A. If there was any change it would show up on the following Friday.

Q. Only if there was a change?

A. Yes, that is right.

Q. Now, if your company had received a financial statement as of September 15th which indicated an insolvent condition as of July 31, 1952, would such item have appeared in your Weekly Sheet?

A. I should say definitely that it would.

Q. And how would that have been indicated?

(Testimony of Raymond W. Gordon.)

Mr. Quittner: He is now asking questions on which no foundation has been laid. There is no evidence here to show that any information was ever communicated to anybody on that July 31st statement, if issued, because they might have made the statement and not have released it.

Mr. Utley: He stated it would only have appeared in the Sheet if there had been any change.

Mr. Quittner: I object to it.

The Referee: The objection is overruled.

(The question was read by the reporter, at the request of counsel.) [29]

A. I can't answer that. I don't know how they arrived at those things back there in Illinois, where that is done.

Q. (By Mr. Utley): If your company had information to the effect that a person was insolvent they would not have, under date of October 24, 1952, rated him as good?

A. No, it would be definitely shown that they were insolvent.

Q. Where a person had been rated in the Blue Book as having a credit of 25M or \$25,000, and after that there is a change in some other respect the elimination of the 25M wouldn't necessarily mean he wasn't good for the \$25,000 credit, would it?

A. I would say not.

The Referee: I don't understand the question or the answer. Do you mean to say, Mr. Utley, if one rating showed 25M and the next rating didn't show

(Testimony of Raymond W. Gordon.)

any M rating of any kind the seller may presume he still has the 25M credit or rating?

Mr. Utley: I will ask him.

Q. Well, when you print these Weekly Credit Sheets is it a fact or is it not a fact that they show only the changes made that are shown in the Blue Book?

A. That is corrected in the previous week, any changes, whether it be the address, telephone number or financial rating.

Q. Then, if Mr. Rogers' rating in the Blue [30] Book appeared to be 25M and your company had received subsequent information that they would not change that figure there would be no mention of the 25M in the Sheets? A. That is right.

Examination

By the Referee:

Q. I don't understand that, and the witness testified he didn't know how these symbols were arrived at; that is, you find in one of these sheets a fragmentary rating and in another one everything is covered, and if you want to know the whole picture you have to go back through all the sheets and get the whole story, and I doubt if that is the way this company does its business. Are you saying, sir, that a rating as it appears in a Weekly Credit Sheet is not complete and doesn't cover the whole rating?

A. It shows the exact rating at the time the sheet is made out, and also from the Blue Book.

Q. But you have just testified that one can still assume after reading the rating on Objector's Ex-

(Testimony of Raymond W. Gordon.)

hibit No. 4 that this man still had a net worth of \$25,000? A. No.

Q. You don't mean to say that?

A. No, that is not correct.

Q. When a rating is given it is a complete rating?

A. It is as complete as they can get it.

Q. But they didn't put out a partial rating on a man as to whether he is good? [31]

A. Well, in some ratings they have the financial net worth, the moral rating included.

Q. But that is not a complete rating as of the date issued; is that correct?

A. Yes, that is correct.

The Referee: Go ahead.

Q. (By Mr. Utley): Is it not a fact that the Weekly Sheet only shows the changes from the rating in the Blue Book? A. Yes, that is correct.

Q. Then if in the Weekly Sheet there was an absence of any rating like \$25,000 or \$10,000 wouldn't that indicate that the \$25,000 had not been changed?

A. Well, I would say that if the financial rating had been taken out there was a reason for it.

Q. When there has been a change on a Weekly Sheet you don't put the entire rating of that person in the Weekly Sheet, do you?

A. Well, the financial and moral rating would be there.

Q. Always?

A. Yes, if there was any change of the rating it

(Testimony of Raymond W. Gordon.)

would be complete to put the financial and moral rating.

Q. If you had information showing a person was insolvent you would never rate him as good, would you?

The Referee: You are putting words in the mouth of [32] the witness.

Mr. Utley: I don't know how I can prove it, then.

The Witness: I don't know how that is done.

The Referee: Get somebody here from Wheaton, Illinois, then, if that is necessary.

Mr. Utley: That is all.

Recross-Examination

By Mr. Quittner:

Q. The symbol 69 appears in the Weekly Sheet?

A. Yes.

Q. What does it mean?

The Referee: I can read it.

Mr. Quittner: All right.

The Referee: "69" is: "Reported previous report should be revised to read."

Mr. Quittner: That is all.

The Referee: Any further questions, Mr. Utley?

Mr. Utley: No further questions, but I will call Mr. Miller back to the witness stand.

The Referee: We will take a short recess.

(Immediately following the five-minute recess the hearing proceeded, as follows.)

The Referee: All right, Mr. Miller, come forward and take the witness stand. [33]

J. E. MILLER

having been previously duly sworn by said Referee in Bankruptcy, testified further as follows:

Redirect Examination

By Mr. Utley:

Q. I am going to show you here, Mr. Miller, the Blue Book of Produce Reporter Company of 1952; is that the book you have heretofore referred to of the Produce Reporter Company?

A. That is a copy of it, yes.

Q. Calling your attention to page 103, I will ask you to read what follows that, which is circled in red pencil under the name of Howard E. Rogers Company.

A. All right.

Q. Have you seen that before?

A. Yes, I have.

Q. That was printed in the 1952 Blue Book your company had?

A. Yes, it was.

Q. Now, I show you the Weekly Credit Sheet of Produce Reporter Company under date of October 24, 1952, and call your attention to that portion circled in red pencil—this is Objector's Exhibit No. 4—under the name Howard E. Rogers Company; have you seen that before?

A. Yes, I have.

Mr. Quittner: Have you seen this exact paper and [34] Exhibit before?

The Witness: Let me see if I have seen a copy of it. Yes.

Q. (By Mr. Utley): Did the copy you saw contain the same information you see there now?

A. Yes, it did.

(Testimony of J. E. Miller.)

Q. Showing you the same Exhibit, Weekly Credit Sheet of October 31, 1952, I call your attention to the name Howard E. Rogers Company circled in red pencil. Did you see that before?

A. I have seen a copy of that Report.

Q. Did you see all of these documents prior to the time of extending credit to Mr. Rogers in November, 1952?

A. Yes.

Q. Did you place any reliance upon those?

A. Yes, I did.

Q. What reliance did you place on them in extending credit to Howard E. Rogers Company?

A. We placed a great deal of reliance or almost entire reliance on that and on our customers based upon the reading of the ratings in the Blue Book, and we refer to these ratings when we sell to our customers.

Q. And are you the sales agent for your company?

A. Yes.

Q. Does that duty fall on you?

A. Yes. [35]

Q. If you had known at the time you sold merchandise to him on credit in November, 1952, that he on the 31st day of July, 1952, showed an insolvent condition would you have extended him credit?

A. No, sir.

Q. In November, 1952, if you had known that he owed large sums of money as shown by Mr. Mulherin's testimony would you have extended him credit?

A. No, sir.

Q. You have heard Mr. Mulherin's testimony

(Testimony of J. E. Miller.)

here? A. Yes, I did.

Mr. Utley: You may take the witness.

Mr. Quittner: I move to strike this testimony on the ground that the witness has not shown in any way that the information contained in the financial statement of July 31, 1952, has ever been communicated to him in any manner, whatsoever, and there is a variance between the pleadings and the proof as to relying on the financial statement.

The Referee: The motion is denied. Proceed.

Cross-Examination

By Mr. Quittner:

Q. When did you first find out that a financial statement had been made by Howard E. Rogers Company to Produce Reporter Company as of July 31, 1952?

A. After we had lost a considerable sum of money he owed us. [36]

Q. Was that after the bankruptcy was filed here? A. Yes, it was.

Q. You are sales manager for the company you are with? A. Yes.

Q. How many employees does your company have?

A. About 10 regularly, and at times as many as a hundred.

Q. Have you a Credit Department?

A. We have an Accounting Department or Book-keeping Department.

(Testimony of J. E. Miller.)

Q. Have you a credit man?

A. He is the bookkeeper and he may be considered as such.

Q. He passes on all the credits?

A. No, not necessarily all of them.

Q. Do you pass on the credits?

A. There is within my jurisdiction a certain amount of option as to whether we sell to one or to another dealer.

Q. It is not your duty, then, to pass upon the credit of anybody, but that is by another employee?

A. No, I would not say that.

Q. What do you say?

A. I say that I am more than partially responsible for the credit, that is, as to whom we sell, and after that buyer is once sold it is handed to the Bookkeeping Department. [37]

Q. In this particular case it was somebody other than yourself who examined the Blue Book?

A. No, I did that, and others there did that also.

Q. Who else?

A. The bookkeeper, and the owner of the business himself, who made the final decision as to the extension of credit.

Q. Are you talking about this particular instance?

A. There was no particular instance, but as to a group I did so myself.

Q. In what form did you communicate it to your employer?

(Testimony of J. E. Miller.)

A. I didn't communicate it to him. That was not necessary, unless something was different.

Q. Are you a member of the company you are with? A. No, I am not.

Q. You are only an employee? A. Yes.

Q. You didn't communicate to anybody that Mr. Rogers' credit was good and that the company you are with should ship to him?

A. No, that is left to my discretion.

Q. And you merely shipped or had the merchandise shipped to him? A. Yes.

Q. Without consulting with anybody? [38]

A. That was not necessary unless there was a change in the report.

Q. How long have you been passing upon credits in the produce business?

A. Since early in 1946.

Q. I would like to ask you this hypothetical question: Let us assume that the October 24th Reporter Produce Sheet came out and stated under the name of Francis F. Quittner here in Los Angeles both symbols 69, 144, triple X 148; will those symbols tell me when I issued a financial statement?

A. Those symbols do not indicate that you issued a financial statement.

Q. Tell me what my net worth was on October 24, 1952?

A. Those symbols do not show that here.

Q. They do not indicate any net worth?

A. No, sir, they do not.

Q. Looking at those symbols again, will you tell

(Testimony of J. E. Miller.)

me what Rogers' net worth was on October 24, 1952?

A. There are no figures here to indicate completely what his net worth was then.

Q. You don't know whether he was solvent or insolvent on that date?

A. I think you do not understand the full value of these figures.

Q. No, answer the question: Could you tell [39] me whether he was solvent or insolvent on that date, based on those symbols? A. Yes.

Q. Then, tell me what was his financial condition on that date?

A. I do tell you that he was insolvent on that date.

Q. How can you tell me that?

A. As the Produce Reporter Company had done it previously.

Q. You blame the Produce Reporter Company for not giving you full information or sufficient information?

A. I think that could be boiled down to be right.

Q. But you did look at the symbols therein and shipped to him without further investigation?

A. Yes.

Q. And the numeral 69 showed the previous report 25M was changed? A. Yes.

Q. And showed Pina & Sons 100M; that means if you are going to ship to them they are worth at least \$100,000? A. Yes.

Q. And when the 69 appeared there you referred back to the Blue Book, and it showed that the 25M

(Testimony of J. E. Miller.)

was reduced? A. Yes, it was changed.

Q. Changed to what?

A. Changed to another series of numerals. [40]

Q. But there is no M rating there?

A. No.

Q. And you don't know whether his financial net worth was \$1 or \$1,000? A. That is correct.

Q. The other numeral credit there is no estimate of net worth? A. Other than itself, no.

Q. Is that the 148 following? A. No, 144.

The Referee: May I see what the symbol is?

Mr. Quittner: Yes.

The Referee: Let me read it right into the record (reading):

“69: Reported previous report should be revised to read”——

“144: Reported no definite estimate as to financial worth.”

“XXX: Good.”

“148: Have conflicting reports—rating indicates reported general experience.”

The only thing which may be a little uncertain is whether there is any significance to the fact that the 69 is in parentheses, and the 144 is in parentheses. I don't know the explanation for that.

Mr. Quittner: Neither do I.

The Referee: Proceed.

Q. (By Mr. Quittner): The XXX's on there refers to [41] character? A. Yes.

Q. And not to anything connected with financial condition? A. Yes, it does in a manner.

(Testimony of J. E. Miller.)

Q. It shows he is credited as being a moral person?

A. Yes, and it has a sense of his ability to pay.

Q. You sometimes see 1M and 1X?

A. Yes.

Q. That means 1X gives you a lot of trouble and don't pay on time? A. Yes, slow pay.

Q. Have you had any previous experience with Mr. Rogers prior to this November shipment?

A. Yes.

Q. His general reputation in the trade was truly XXX, wasn't it? A. Up to that time.

Q. So far as you knew?

A. Yes, with the possible exception now and then.

Q. But generally you regarded him as XXX?

A. Yes.

Q. And to your knowledge at that time he was considered XXX; is that correct? A. Yes.

Q. There was nothing—that is, he had not [42] stolen anything or done anything of an immoral nature; is that right? A. That is right.

Mr. Quittner: That is all for this witness.

Mr. Utley: No further questions.

The Referee: Call your next witness.

Mr. Utley: We will call M. E. Nelson.

M. E. NELSON

the witness, having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: May we have your name, sir?

A. M. E. Nelson.

Direct Examination

By Mr. Utley:

Q. And where do you live?

A. 420 East Hickory Street, Lompoc, California.

Q. What is the nature of your business or occupation?

A. I manage and direct the operation of a vegetable business and handle the sales of it.

Q. Do you know Howard E. Rogers here?

A. Yes, I do.

Q. How long have you known him?

A. Three or four years.

Q. Have you had business dealings with him in the sale of vegetables and fruit to him?

A. May I say as sales manager I took over that job [43] October 1, 1951, and I have known him before that time, but actually from that time until early October, 1952, I had not sold him anything, but my company did.

Q. What company did?

A. California Vegetable Growers.

Q. Are they a creditor here?

The Referee: They are not set up here in the Schedules.

Mr. Utley: The Schedules refer to the Petition-

(Testimony of M. E. Nelson.)

ing Creditors and notes on page 3 that you were engaged in the sale of vegetables and fruit.

The Witness: Yes.

Mr. Quittner: I move to strike that as to one individual and one item. We can't meet any such pleading.

The Referee: What do you say, Mr. Utley?

Mr. Utley: I am willing to stand on the language of it.

The Referee: The motion is granted. Proceed.

Mr. Utley: Does your Honor mean by that to say we can't show by this witness his dealings with the bankrupt?

The Referee: That is right.

Mr. Utley: At this time we would offer to prove by this witness that he was sales manager for his company, a creditor of this bankrupt; that he——

Q. Over what dates did you make the sales to Howard E. Rogers? [44]

A. From October 2nd through November 11, 1952.

Q. During that time you sold Howard E. Rogers or Howard E. Rogers Company how much in dollars and cents?

A. \$12,269.19 worth of vegetables and produce, mostly crated carrots.

Mr. Utley (Continuing): ——that he extended credit to Howard E. Rogers, and in doing so he relied on the credit rating shown by the Blue Book of Produce Reporter Company heretofore referred to and the page referred to in the 1952 issue of that

(Testimony of M. E. Nelson.)

book of Produce Reporter Company and upon the Weekly Credit Sheets subsequently issued by said company, and that his company was a subscriber to that service, and that in extending this credit he relied upon the rating therein; and that had he known at the time of extending such credit that Howard E. Rogers was insolvent he would not have extended that credit.

The Witness: That is right.

The Referee: Is there any objection to the offer of proof?

Mr. Quittner: Yes, I object to it as being incompetent, irrelevant and immaterial and not in accordance with the pleadings before this Court.

The Referee: The objection is sustained. Step down. Call your next witness.

Mr. Utley: At this time we ask, in the light of the Court's ruling here, we ask permission to take the deposition [45] of some person of Produce Reporter Company at its home office in Wheaton, Illinois, for the purpose of establishing the fact that this company did receive this financial statement from Mr. Rogers and that the rating they placed in their Blue Book, in their Weekly Credit Sheets thereafter was based upon the information received in this financial report of Howard E. Rogers showing a condition existing as of July 31, 1952.

Mr. Quittner: We will oppose that motion, if the Court please.

The Referee: On what grounds?

Mr. Quittner: They assume, for the purpose of

argument here, that a deposition would produce such testimony as the symbols themselves show, and as the witness representing the Produce Reporter Company earlier testified to, that a number of symbols relate to a financial statement they had, and further assuming the testimony would show that these symbols were based upon a financial statement, no reliance could be placed by any creditor for the extension of credit.

The Referee: The motion is denied. You may call your next witness, Mr. Utley.

Mr. Utley: That is all.

The Referee: Proceed, Mr. Quittner.

Mr. Quittner: If he is going to take a deposition I would like——

The Referee: No, I said that Mr. Utley's motion is [46] denied. Proceed.

Mr. Quittner: Do you rest?

Mr. Utley: Yes.

Mr. Quittner: At this time we would like to move to dismiss Specification Number I—Number II having been already abandoned—on the ground of there being no proof by any creditor here that he relied on the financial statement of July 31st, as set forth in the Specification, and there is no reason why the bankrupt should now go forward with any testimony, because there is no testimony to meet and overcome, and we ask that the Specification be not sustained.

The Referee: The motion is denied. The instrument which is Objector's Exhibit No. 3, being a page

from the 1952 Blue Book of the Produce Reporter Company, on the reverse side thereof, as explained on page 6, I think it is necessary to have that in the record so that we may fully understand these symbols and the explanation contained on page 6.

Mr. Utley: If that is necessary I move that it go in as an exhibit.

The Referee: Have you seen it, Mr. Quittner?

Mr. Quittner: Yes.

The Referee: Then, may it be stipulated that the reporter at this point may copy into the record the matter contained on page 6 of the Blue Book, under the caption: [47] "Moral Responsibility." Is that stipulated?

Mr. Quittner: So stipulated.

Mr. Utley: So stipulated.

The Referee: The reporter will copy that page in at this point.

Page 6 of the Blue Book.

"Moral Responsibility.

"Moral Responsibility is the most important part of every deal—first last and all the time.

"Neither the words in any contract, nor the contract itself are nearly as important as the moral responsibility of the parties to that contract.

"Without the willingness and ability to complete the deal, on the part of both parties, there is no Real Deal.

"Therefore, Blue Book Moral Responsibility ratings are a blend of all factors of Honesty, Integrity and Ability to capably perform a service.

“Neither laws, rules nor regulations can make a man honest.

“Honest intentions or sound moral responsibility methods are what you should give first consideration to, in every deal.

“Be safe—not sorry. Check the latest Blue Book rating before confirming.”

Mr. Quittner: If the Court please, if I may address the Court on this triple X, since I see what the Court has in [48] mind; the statement as to the three X's has no reference to figures in the statement of July 31st.

The Referee: I don't want to indicate that I am forming any conclusion, but I want that to be in the record somewhere here.

Mr. Utley: Does your Honor have the Statement of Affairs in the file?

The Referee: Yes (passing document to Mr. Utley).

Mr. Quittner: I will call Mr. Gordon.

The Referee: Come forward, Mr. Gordon, and take the witness stand. You have been sworn.

RAYMOND W. GORDON

thereupon testified further as follows:

Direct Examination

By Mr. Quittner:

Q. Mr. Gordon, would you interpret for the record here in the statement the triple X in your Blue Book as relating to the bankrupt; the three X's

(Testimony of Raymond W. Gordon.)

mean good morally, good appearance, integrity and good pay, and that has no relation, whatever, to the financial condition of the company, does it?

A. No, sir.

Q. Is it possible for a man or a company to have a net worth of \$100,000 and still get a 1X rating?

A. Yes.

Mr. Quittner: That is all. [49]

Mr. Utley: No further questions.

Mr. Quittner: We will call George K. Redpath.

GEORGE K. REDPATH

the witness, having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: What is your name?

A. George K. Redpath.

Direct Examination

By Mr. Quittner:

Q. What is your business?

A. Buying accounts receivable.

Q. With what organization are you connected?

A. Produce Clearings.

Q. In that capacity, in buying accounts receivable, have you had the occasion to use the Blue Book and records of Produce Reporter Company?

A. Yes, I have.

Q. Are you familiar with the symbols used by Produce Reporter Company in its Blue Book?

A. Yes.

(Testimony of George K. Redpath.)

Q. I would like to show you Objector's Exhibit No. 4 and call your attention to the circled "(69)" "(144)" and "XXX148." A. Yes.

Q. Are you able to interpret those symbols?

A. Yes. [50]

Q. And as a credit man do they indicate to you whether or not you as a credit man could rely upon those symbols for the purpose of their exact credit meaning and credit rating? A. Yes.

Q. What would be your interpretation as to whether or not this man was a good or a bad credit risk?

A. I would not grant credit on that until I had more information.

Q. Do those symbols in any way indicate to you that a financial statement has actually been issued?

A. No.

Q. You can't tell from that? A. No.

Q. Does the removal of the 25M indicate anything to you? A. Yes, it does.

Q. What?

A. That he had a loss of money.

Q. If an account receivable of Howard E. Rogers had been offered to you for purchase would you have purchased it based on that? A. No.

Mr. Quittner: No further questions. [51]

Cross-Examination

By Mr. Utley:

Q. The "XXX148" doesn't indicate an insolvent condition? A. No; it is very meager.

(Testimony of George K. Redpath.)

Q. It shows him classed as "Good."

A. No, I wouldn't say that. It would show to me that he had been a responsible produce man, but doesn't show me what he was then worth, and that condition changes very rapidly.

Q. But you didn't interpret it as meaning his present condition?

A. No, but I wouldn't put out my money on that type of credit rating.

The Referee: This is not a case of his private interpretation. No subscriber of the Blue Book has any right to place interpretation on the symbols therein other than that indicated by the publisher of the Blue Book itself.

The Witness: No.

The Referee: Anything further?

Mr. Utley: That is all.

Mr. Quittner: That is all.

The Referee: Call your next witness.

Mr. Quittner: No further testimony.

Mr. Utley: May it please the Court, I am going to call a somewhat unusual matter to your Honor's attention. [52]

The Referee: Not unless you are going to put it in evidence, you can't.

Mr. Utley: This is by way of a motion. I have just been handed a financial statement issued directly to the Travelers Indemnity Company of Hartford, Connecticut, under date of May 31, 1952, showing a very solvent condition and total net worth of approximately \$90,000 by Howard E. Rogers, which financial statement, I am told, was issued to

the Travelers Indemnity Company for the purpose of securing a bond in this business, and I have just examined the Statement of Affairs of the bankrupt here, and under the heading——

The Referee: If you are going to put something in evidence, put it in, and don't argue it until it is in evidence.

Mr. Utley: I am going to move for permission to amend the Specifications of Objections to include the issuance of a false financial statement to the Travelers Indemnity Company by this bankrupt under date of May 31, 1952, and signed by Howard E. Rogers under date of June 24, 1952, and which was issued for the purpose of securing a bond from the Travelers Indemnity Company, and call your Honor's attention to the fact that the Statement of Affairs doesn't disclose to the Trustee in Bankruptcy or to any creditor the fact that he had issued this financial statement for that purpose, and I just heard of it a few days ago when the Travelers Indemnity Company's representative called me up and informed [53] my secretary that they had such statement, and I asked them to be here today with it, and had I known about it at the time I prepared the Specifications of Objection I most certainly would have included it therein; and I will state very briefly and very plainly that——

The Referee: Is that your motion?

Mr. Utley: Yes.

The Referee: Is there any objection?

Mr. Quittner: Yes, we object on the ground that it is attempting to introduce a new cause of action.

The Referee: You have not as yet stated you have a cause of action in that respect.

Mr. Utley: We will show by this witness that they relied on this financial statement.

The Referee: Did they pay for the bond?

Mr. Utley: They are a creditor here.

The Referee: If he got the bond on credit you might have a cause of action; if he didn't, I don't know that you have any cause of action.

Mr. Utley: We know the bonding company lost money on the bond, and would not have written the bond if they had known his true financial condition.

The Referee: But you still might not be under Section 14 (c). You might be under Section 17, I don't know; but the immediate question is whether you should be given leave to amend. Ordinarily it is elementary that you can't amend by [54] introducing a witness: the matter requires the construction of the extent of Section Fifteen, which says:

“The Court may, upon the application of parties in interest who have not been guilty of laches, filed at any time within one year after a discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge.”

I think Referee Hunt had something along this line not very long ago where before the discharge was entered it appeared the Trustee or Creditors had been misled by statements of the bankrupt and

had not known of an existing ground of objection. In that event there is no use in our delaying a ruling on the Specification already before the Court. This is an entirely distinct situation. So I will rule——

Mr. Utley: I would like your Honor to rule on this before passing on the other matter.

The Referee: I can't now grant or deny your motion at this moment and I am going to rule on Specification One here while it is fresh in our minds. I will rule on your motion, but will get this out of the way first. I don't want to take snap judgment on it, because it is rather an involved situation; it is not the ordinary financial statement case we get here in the run-of-the-mill [55] proceeding. I would like to discuss it with you, and I am going to do so at 2 o'clock this afternoon, if you can bring the witness here, and if you can produce any citation of authority for such procedure on an amendment.

Mr. Utley: I am leaving next week.

The Referee: Then, come back at 2 o'clock this afternoon. I will keep this Blue Book here. The matter is now continued to 2 o'clock this [56] afternoon.

Friday, December 11, 1953—2 P.M.

The Referee: Howard E. Rogers. Is there any further evidence?

Mr. Utley: No further evidence, may it please the Court; and on that motion I made for permission to file an amendment your Honor asked for

citation of authority to do so, and I have found a case in 143 Federal Second, page 442, which held in effect that a creditor who found a ground for objection to discharge before the discharge was granted, I believe, or it mentioned the fact that he might within one year set it aside. I think it was a case Mr. Laugharn had, and it held that you could amend, and that it was within the jurisdiction of the Court to amend.

The Referee: I think that on this motion we should have a record, and I am going to suggest that if you want to press the motion you file a written petition for leave to amend, and verify it, setting up all the factual grounds on which you believe you have the right to amend, and furnish counsel a copy of that, and maybe counsel will stipulate that we might now proceed to rule on it.

Mr. Quittner: I am willing to do that, but I want to get the motion first, if I may. My client doesn't reside in the City of Los Angeles now, and I do not have the statement before me and I would like to see it and maybe put it in evidence as an exhibit. [57]

Mr. Utley: I haven't it here with me now, but did have it this morning.

The Referee: I repeat that I think a matter which is as important as this is to the creditors and to the bankrupt it should be presented by formal papers and not by an oral motion at this hearing, where Specifications of Objection are already on file. I think Mr. Utley should file a verified petition and you, Mr. Quittner, should file an answer, and

then we will rule on it, but not rule on it today. First of all, Mr. Utley will not only have to set up the facts which he believes he can prove in his petition, but he will have to show that they constitute a ground of objection to discharge, of which I have some doubt at this time, unless he got credit on the premium for the bond. I don't know, but it might come under Section Seventeen.

Well, let's see how far we can get along on the case in chief, and then decide as to the time on the other phase of it.

Well, gentlemen, we have an entirely new picture situation here. We have heard many objections to discharge on the ground of false financial statements, but never one like this one or even remotely like this one.

This is a summary of the facts which are in the record:

Mr. Rogers unequivocally made a financial statement and it was as of July 31, 1952, which was received on [58] September 15, 1952, by the publisher of this Blue Book. At that time Mr. Rogers had a rating in the Blue Book, and Mr. Utley's witness, Mr. Gordon, testified that any change in the rating that might be suggested by a financial statement coming into the hands of the publisher of the Blue Book would appear in one of the Weekly Credit Sheets in the week of the receipt of the statement; but, apparently, it didn't work out quite that way, because the change in the rating was made October 24, 1952, and then the only change was on

October 31, 1952, which has been referred to as a change of address; but is that all that it is? This is what it literally says:

“Rogers, Howard E. Co. (Howard E. Rogers, Prop.), 246 Wholesale Terminal Building.” The 69 is:

“Reported previous report should be revised to read.” Does that eliminate the previous rating?

Mr. Utley: I don't think it was the intention of that to eliminate the rating.

The Referee: Well, in any event, after the receipt of these Weekly Reports the only creditor whose case has been established by the evidence, if that case has been established by the evidence, is that he sold Mr. Rogers a substantial amount of merchandise on credit, and the testimony is that the sales manager or credit manager of that firm relied on the rating as it was revised by the papers which are Objector's Exhibit No. 4. Mr. Utley, do I have reasonable [59] ground for believing that Mr. Rogers obtained property on credit by making or publishing a false financial statement? There is not any question but that from the evidence here the finding must be that the statement he did give was false. There is no showing that he was asked for the statement. He did give it and he did give it to Produce Reporter Company, the publisher of the Blue Book. What influence, if any, did it have on the publisher of the Blue Book in making the revised rating? The statement shows a net worth of \$57,000. The odd thing is that the revised rating eliminates the estimated net worth of \$25,000 which

had theretofore been assigned to Mr. Rogers. What is the exact language of that? The rating refers to situation No. 144, and that is: "Reported no definite estimate as to financial worth."

In other words, the Blue Book didn't believe Mr. Rogers' statement. The statement showed a net worth of \$57,000 and that said he has no financial worth or reported no definite estimate as to financial worth. Now, Mr. Rogers did not have to give this statement, so far as we know. It could have been a voluntary act on his part. The statement was false. If it had been true it would have shown a deficit of something like \$100,000. Now, if it had shown that deficit, what kind of a report would the Blue Book people have given? There are a number of situations that may be reported on by the reporting company. In other words, their number "106" says: "Reported voluntary petition in bankruptcy filed." [60] "107" says: "Reported involuntary petition in bankruptcy filed." "108" says: "Reported liquidating." "109": "Reported business is in hands of creditors." "110": "Reported insolvent." If the statement had shown insolvency would the Blue Book have rated him "110"?

One wonders, Mr. Utley, why the creditor who relied or extended credit in the face of the report which it had before it, which said, "Reported no definite estimate as to financial worth," particularly where theretofore he had had a report as to financial worth in the sum of \$25,000.

Now, let's see about these "XXX"s: The quota-

tion "XXX"s means "Good"; and that is further explained on page 6 of the Blue Book, where it says:

"Moral Responsibility

"Moral responsibility is the most important part of every deal—first, last and all the time.

"Neither the words in any contract, nor the contract itself are nearly as important as the moral responsibility of the parties to that contract.

"Without the willingness and ability to complete the deal, on the part of both parties, there is no Real Deal.

"Therefore, Blue Book Moral Responsibility ratings are a blend of all factors of Honesty, Integrity and Ability to capably perform a service.

"Neither laws, rules nor regulations can make a man honest. [61]

"Honest intentions or sound moral responsibility methods are what you should give first consideration to, in every deal.

"Be safe—not sorry. Check the latest Blue Book rating before confirming."

So, it would appear as has been suggested here that the triple X rating had nothing to with financial ability. Therefore, Mr. Utley, I say I wonder why your people were overlooking the rating to extend credit of approximately \$40,000.

Here is our problem in another point, I think. Section 14(c) says that if the Objector shall show reasonable ground for believing that the bankrupt has committed any of the acts which, under sub-

division c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

Are there here reasonable grounds for believing that if the bankrupt's statement had been true rather than false the publisher of the Blue Book would have given him the rating of 110, which shows "Reported insolvent," and if so, is there reasonable grounds for believing that the creditor would not have granted credit? I think that is the summary of it, and I would be glad to hear what you gentlemen have to say. Mr. Utley, you have the first word on it.

Mr. Utley: I asked the witness if he had known the [62] bankrupt was insolvent would he have extended him credit, and he testified that he would not have done so, and had the bankrupt reported to the Reporter Company the true situation then we have a right to assume that would have been their report. As a matter of fact, it is not before the Court, but subsequently that was reported——

The Referee: Well, you must not say that, Mr. Utley; there is no evidence to contradict it, and he was hopelessly insolvent at the time of making the report, but showed himself to have a net worth of \$57,000. There is no question about the fact that anybody in giving a statement to the Blue Book does it for the very purpose of obtaining credit, just like they do in giving a financial statement to Dun & Bradstreet.

Of course, the mysterious thing about the whole

case is that after receipt of the financial statement showing a net worth of \$57,000 the Blue Book withdraw its financial rating of \$25,000. In other words, there must have been some factors known to the Blue Book which cast a doubt upon that statement of \$57,000; but the point I am making is this:

Is there, nevertheless, reasonable ground here to believe that if the statement had shown the insolvent condition which actually existed the Blue Book, in the ordinary course of its business, would have rated him 110 instead of 148? [63]

Mr. Utley: I think they most certainly would have.

(Argument by Mr. Utley.)

The Referee: All right, Mr. Quittner.

(Argument by Mr. Quittner.)

The Referee: All right, gentlemen, I have come to the conclusion that there are considerable grounds for believing that the bankrupt has committed an act which would be a bar to his discharge, and that the bankrupt has not met the burden imposed upon him by Section 14(c) of the Bankruptcy Act to prove that he did not commit the act. I say there are reasonable grounds for believing that, for these reasons: The statement was published, and it has long been settled, I am saying, that a financial statement given to a credit reporting company is a statement within the meaning of Section 14(c). There are here definitely reasonable grounds for believing that if this financial statement had been true and had shown a deficit of

\$100,000 that the reporting agency would have transmitted the code number 110 to its subscriber, which would have meant it was reporting that the bankrupt was insolvent and there was reasonable ground for believing that if the credit manager who is here involved had been familiar with code number 110 he would not have extended the credit by which the bankrupt did obtain property on credit by making and publishing a false financial statement as to his financial condition.

How much time do you want, Mr. Utley, to file your [64] motion to amend?

Mr. Quittner: Do you still want to file it?

Mr. Utley: I may not wish to file it.

The Referee: There is going to be one result, because I shall not enter any order until after the Specifications are on file or hereafter filed are heard. So, if any other Specifications are filed I will hear them before any order is made. I will give you a deadline within which you will have to file your motion, and set it for hearing. Mr. Quittner wants to be heard, very definitely, on the motion itself. We can hear the motion and if it is granted we can proceed immediately to a hearing on the merits.

Mr. Quittner: I would like to have them heard separately.

The Referee: I think that would be a better way. There is no use of having the witness here or even the bankrupt here on the motion, because it will have to be heard on the pleadings. We will not

hear any evidence on the motion. The motion must be filed and set it for hearing sufficiently long in advance in order to prepare a reply. How much time do you want?

Mr. Quittner: 15 days.

The Referee: When filed Mr. Utley can give notice of the date of hearing, which will be not less than 15 days.

Now, so far as the findings on this are concerned, Specification Number One is sustained. Specification Number [65] Two is dismissed. The Objector may have to January 5th, 1954, in which to file a motion for leave to file an additional Specification of Objection, and if filed the bankrupt is to have 15 days in which to reply. That is all at this [66] time.

Certificate

I, E. B. Bowman, Official Court Reporter for the Honorable Benno M. Brink, Referee in Bankruptcy, at Los Angeles, California, do hereby certify that I attended and reported in shorthand the testimony adduced and proceedings had before said Referee in Bankruptcy on the 11th day of December, 1953, in the Matter of Howard E. Rogers, dba Howard E. Rogers Company, Bankrupt, In Bankruptcy No. 55,620-BH, at the hearing on Objections to Discharge of said Bankrupt, and that the foregoing 66 pages comprise a full, true and correct transcript thereof, and a full, true and correct transcription of my shorthand notes of said hearing.

Dated at Los Angeles, California, this the 27th day of September, 1954.

/s/ E. B. BOWMAN,
Official Court Reporter.

[Endorsed]: Filed September 29, 1954. [67]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 40, inclusive, contain the original

Creditors' Petition;

Order of General Reference;

Adjudication of Bankruptcy;

Specifications of Objections to Discharge;

Findings of Fact and Conclusions of Law Re:
Specifications of Objection to Bankrupt's Discharge;

Order Denying Discharge of Bankrupt;

Petition of Bankrupt for Review of Order of Referee Denying Discharge in Bankruptcy;

Referee's Certificate on Petition for Review of Order Denying Discharge;

Order Affirming Order of the Referee Denying Bankrupt a Discharge;

Notice of Appeal;

Appellant's Statement of Points on Appeal;

Designation of Record on Appeal;

Appellant's Additional Designation of Record on Appeal;

which, together with the original Objector's Exhibits Nos. 3 and 4; and 1 volume of Reporter's Transcript of proceedings had on Dec. 11, 1953; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 31st day of March, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14707. United States Court of Appeals for the Ninth Circuit. Howard E. Rogers, Doing Business as Howard E. Rogers Co., Appellant, vs. George Gardner, Trustee in Bankruptcy of the Estate of Howard E. Rogers, etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14707

HOWARD E. ROGERS,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of HOWARD E. ROGERS, dba
HOWARD E. ROGERS CO., Bankrupt,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court: To
George Gardner, Trustee in Bankruptcy
Herein; and to Ernest R. Utley, His Attorney:

I.

Comes now the above-named Appellant and formally adopts as his Statement of Points on Appeal, the said Statement heretofore filed in the District Court of the United States, Southern District of California, Central Division, in Bankruptcy No. 55,620-BH, which said Statement appears in the typewritten transcript of record herein.

II.

Comes now the above-named Appellant and hereby designates as the record on appeal those

portions of the record and proceedings referred to in the "Designation of Record on Appeal" and "Appellant's Additional Designation of Record on Appeal" heretofore filed in the District Court of the United States, Southern District of California, Central Division, in Bankruptcy No. 55,620-BH, which said designations appear in the typewritten transcript of record herein.

Dated: April 5, 1955.

QUITTNER AND STUTMAN,
By /s/ GEORGE M. TREISTER,
Attorneys for Appellant.

[Endorsed]: Filed April 6, 1955.

No. 14707.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD E. ROGERS, Doing Business as HOWARD E.
ROGERS Co.,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of HOWARD E. ROGERS, Etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

QUITTNER & STUTMAN, and
GEORGE M. TREISTER,

639 South Spring Street,
Los Angeles 14, California,

Attorneys for Appellant.

FILED

MAY 10 1955

PAUL P. O'BRIEN, CLERK

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD E. ROGERS, Doing Business as HOWARD E.
ROGERS Co.,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of HOWARD E. ROGERS, Etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Statement of the Case.

An involuntary petition in bankruptcy was filed against Appellant on December 29, 1952. [Tr. pp. 3-6.]¹ Following reference of the proceeding to Referee in Bankruptcy Benno M. Brink [Tr. p. 7], an order of adjudication was duly entered on January 20, 1953, Appellant making no objection thereto. [Tr. p. 8.]

¹All citations to the record refer to the printed Transcript of Record on file in the Court of Appeals.

On June 30, 1953, Appellee Trustee in Bankruptcy filed Specifications of Objections to Appellant's discharge alleging two grounds: First, an alleged false financial statement, and second, an alleged failure to explain a deficiency of assets. [Tr. pp. 9-12.]²

Trial of the issues thus raised was held on December 11, 1953 before the Referee, who sustained the first specification and denied Appellant's discharge on this ground. Evidence was not offered by the Trustee as to the second specification which was therefore dismissed, and accordingly is no longer material. Findings of Fact, Conclusions of Law and Order Denying Discharge were eventually entered by the Referee on October 21, 1954. [Tr. pp. 12-17.]

Appellant filed a timely Petition for Review of the Order denying his discharge on November 1st. [Tr. pp. 18-20.] Thereafter the matter was briefed and argued before District Judge Ben-Harrison, who adopted the Referee's findings and conclusions and affirmed the order denying discharge by order entered February 18, 1955. [Tr. pp. 21-22.]

This appeal was taken from the order of the District Judge by timely Notice of Appeal filed March 2, 1955. [Tr. pp. 22-23.]

Statement of the Evidence.

Produce Reporter Company is a national mercantile agency which publishes for its subscribers credit information regarding those engaged in the produce business. The

²The Trustee at the time of trial requested leave to file an additional or third specification. [See Tr. pp. 82-83.] But permission to so file was ultimately denied by the Referee.

data is furnished annually in a permanent volume called the "Blue Book"; interim reports are provided for the subscribers in weekly credit sheets. All Produce Reporter Company credit ratings are contained in certain coded symbols placed next to the name of the person or firm reported upon. These symbols may be decoded by means of a key or legend which appears in the front of the book. [Finding II(a), Tr. p. 13.]

The Blue Book published in April, 1952, showed Appellant as having a net worth of \$25,000.00. [Finding II(b), Tr. p. 13.] On or about September 15, 1952, Appellant furnished to Produce Reporter Company the financial statement involved in this case which the Referee found to be false. [Finding II(c), Tr. pp. 13-14.] Thereafter in the weekly credit sheet of October 24, 1952, Appellant was given the rating "(69) (144) XXX (148)," which, when decoded, means: That the previous report on Appellant should be revised to show that there was no definite estimate as to his financial worth; that his reported methods, reputation and credit standing were good; that Produce Reporter Company had conflicting reports with respect to Appellant; and that the new rating indicated *reported general experience* with him. [Finding II(d), Tr. p. 14.]³

In November, 1952, Williams Farms Company, Inc. delivered merchandise to Appellant on credit in reliance

³The Produce Reporter Company assigns the following meanings to these symbols:

"69: Reported previous report should be revised to read—

"144: Reported no definite estimate as to financial worth."

"XXX: Good."

"148: Have conflicting reports—rating indicates reported general experience." [Tr. p. 61.]

upon the foregoing rating. [Finding II(f), Tr. pp. 14-15.] At the time of extending the credit, however, Williams Farms Company, Inc. did not know that Appellant had issued a financial statement, nor did it discover this fact until after his bankruptcy. [Tr. p. 57.]

Statute Involved.

Section 14(c)(3) of the Bankruptcy Act, (11 U. S. C., Sec. 32(c)(3)) provides:

“The Court shall grant the discharge unless satisfied that the bankrupt has . . . (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition;”

Issue Presented.

Can a bankrupt who has issued a false financial statement be denied his discharge under Section 14(c)(3) of the Bankruptcy Act where there is neither evidence nor a finding that any creditor relied upon the statement in extending credit?

Specification of Error.

No creditor relied upon Appellant's financial statement in extending credit to him, and, in the absence of such reliance, there is no basis for denying the discharge under Section 14(c)(3) of the Bankruptcy Act.

Argument.

It is well established that before a discharge can be denied under Section 14(c)(3) of the Bankruptcy Act on the ground that the Bankrupt issued a false financial statement, there must be proof that a creditor extended credit in reliance thereon. Thus, in *Banks v. Siegel*, 181 F. 2d 309, 310 (C. A. 4), the Court stated:

“It is true that a discharge will be granted if there was no reliance upon the false financial statement by the party making the loan.”

In the case of *Matter of Day*, 11 Fed. Supp. 400, 28 A. B. R. (N. S.) 115, the Court said:

“It seems to be settled . . . that it is necessary not only for the creditor to show a false statement in writing respecting the bankrupt’s financial condition, but that the creditor from whom the money was obtained relied upon this statement.”

In *Matter of Kenney*, 43 A. B. R. (N. S.) 242, 244-245, it was held:

“The rule seems to be that in order to deny a discharge where a false financial statement has been given, that the proof must establish not only that the statement given by the bankrupt was false, but also that the creditor relied upon the false statement in extending the credit.

“As the agent of creditor who took the statement and extended the credit has failed to appear in this proceeding, the finding must be that the proof offered is insufficient to sustain the specifications of objections to the discharge of this bankrupt.”

Other cases to the same effect are collected in 1 *Collier on Bankruptcy*, at page 1365, where the Treatise states:

“It was not the intention of Congress to extend clause (3) to all cases of false written statements where credit happens to have been given, but it should be confined to cases where the decision to give credit was induced by the false statement . . . *i.e.*, the lender or seller must to an extent at least have relied upon it.”

In the present case there is no finding, nor is there any evidence in the record to indicate, that Williams Farms Company or any other creditor relied upon Appellant's financial statement, as distinguished from the coded credit rating. On the contrary, at the time Williams Farms Company extended credit to Appellant, it did not know that he had furnished a statement to Produce Reporter Company, and did not discover this fact until after bankruptcy ensued. [Tr. p. 57; see also Tr. p. 50.]⁴

The coded symbols, moreover, give no indication that a financial statement had been issued. The rating on its face shows that it is *not* based on a financial statement, that it does not purport to communicate financial data or Appellant's net worth to any creditor, and that it is based

⁴“Q. When did you first find out that a financial statement had been made by Howard E. Rogers Company to Produce Reporter Company as of July 31, 1952? A. After we had lost a considerable sum of money he owed us.

Q. Was that after the bankruptcy was filed here? A. Yes, it was.

Q. You are sales manager for the company you are with? A. Yes.” [Tr. p. 57.]

only on Appellant's general experience in the trade. [See Tr. pp. 60-62.]

Furthermore, it should be pointed out that Produce Reporter Company employs a special symbol, namely, the number "65", to communicate that a financial statement has been received from a person reported upon. This symbol was not used in appellant's rating. [Tr. p. 50.]

Even Produce Reporter Company refused to believe or rely upon the financial statement in preparing Appellant's rating of October 24th. While this agency, as has been noted, reported a \$25,000 net worth for Appellant in the Blue Book of April, 1952, all reference to net worth was omitted following receipt of the statement in question. This fact prompted the Referee in summarizing the evidence to observe:

"What influence, if any, did [Appellant's financial statement] have on the publisher of the Blue Book in making the revised rating? The statement shows a net worth of \$57,000. The odd thing is that the revised rating eliminates the estimated net worth of \$25,000 which had theretofore been assigned to Mr. Rogers. . . .

"In other words, the Blue Book didn't believe Mr. Rogers' statement." [Tr. pp. 77-78.]

Accordingly, there is no possibility of a causal connection between the financial statement and the rating of October 24, 1952, on the one hand, and the extension of credit by Williams Farms Company in November, 1952, on the other hand.

It should be noted in passing that the Blue Book rating of April, 1952, has no bearing on the issue presented here. In the first place, Williams Farms Company extended the credit in question in November with knowledge that the April, 1952 rating had been superseded by the one of October 24th.

Secondly, there is nothing in the record to indicate that the rating of April, 1952 was not a true report of Appellant's financial condition at that time. Whatever was Appellant's condition in April, 1952, however, a rating accorded him then could not possibly be affected by a financial statement issued in September, approximately five months later.

For these reasons, therefore, the Referee said:

“The Referee: It is quite clear that the Blue Book of 1952 is not material here and we are limited to what he referred to as Quarterly Reports and the statements.” [Tr. pp. 40-41.]

In affirming the Referee, the District Judge seems to have believed that this Court's opinion in *Yates v. Boteler*, 163 F. 2d 953, dispenses with the requirement of creditor reliance upon the financial statement. Appellant submits, however, that the *Yates* case, correctly read, holds only that a creditor's total or partial reliance upon data contained in a false statement issued to a credit reporting agency is a basis of opposition to discharge. There, a creditor did in fact rely upon a statement furnished by the bankrupt to Dun & Bradstreet. This was possible since the credit agency actually transmitted to its sub-

scribers the financial data received.⁵ But in the present case, Produce Reporter Company did not communicate in any manner to any person the information contained in Appellant's statement, with the result that creditors could not rely thereon even partially. Indeed, as has been seen above, the mercantile agency itself did not believe or rely upon the statement here in question.

A situation practically identical with the instant one was before Referee in Bankruptcy Reuben G. Hunt in *Matter of Earline Leota Shedd*, No. 59,358-WB, Southern District of California, affirmed on review without opinion by District Judge William Byrne on January 26, 1955. In the *Shedd* case, a false statement was furnished a credit agency which used it in preparing a coded report on the bankrupt. Creditors subsequently extended credit in reliance on this rating. Referee Hunt held that the discharge must be granted because no creditor relied on the statement as distinguished from the opinion of the mercantile agency embodied in the rating. While Appellant does not suggest that a decision of a Referee in Bankruptcy is in any way binding upon this Court, nevertheless pertinent excerpts from the Certificate on Review

⁵For example, this Court observed in *Yates v. Boteler*, 163 F. 2d at 954:

"Thereafter, Dun & Bradstreet prepared a report containing much information not given by the appellant, but also accurately embodying the figures that he had given to the agency's representative."

And at page 955:

"In his testimony, the appellant admitted that the statement distributed by Dun & Bradstreet contained the same figures that he had given to the agency's representative."

are set forth in Appendix "A" to this brief as being sound in logic and therefore persuasive.

It is submitted that the Court below confused the question of "What action would have been taken by a creditor had Appellant furnished an accurate statement?" with the question of "Was there in fact reliance by a creditor upon a false statement?" The former question calls for mere speculation. The latter is the only material one and must be answered here in the negative.

Conclusion.

For the foregoing reasons, the order appealed from should be reversed.

Respectfully submitted,

QUITTNER & STUTMAN,

By GEORGE M. TREISTER,

Attorneys for Appellant.



APPENDIX "A".

Pertinent Excerpts From Certificate on Review of Referee Reuben G. Hunt in Matter of Earline Leota Shedd, No. 59358-WB, Southern District of California.

"IV.

"COMMENT OF THE LAW AND THE EVIDENCE.

"A discharge is a legal right, to be denied only if the bankrupt has been guilty of one of the acts which the Bankruptcy Act makes a ground for its denial, and the provisions for discharge are to be interpreted liberally in favor of the bankrupt. *In re Farrow*, SD Cal., 40 ABR, NS, 155, 28 F. S. 9; *Bockus v. Yuen*, CCA, 9, 29 F. (2) 205, 13 ABR, NS, 204; *Johnston v. Johnston*, CCA 4, 22 ABR, NS 340, 63 F (2) 24."

"2. THE STATEMENT WAS NOT FURNISHED TO THE CREDITORS WHO EXTENDED THE CREDIT.

"The creditors who extended the credit never saw the statement in question, nor did they ever see a copy of it. It was never communicated or exhibited to them. All they got was the opinion of the mercantile agency as to the financial rating of the bankrupt's husband. A false statement made to a mercantile agency for general use constitutes a basis for the denial of a discharge in bankruptcy. The agency is the representative of the debtor for the purpose of obtaining credit by means of exhibiting the statement to the creditor. *Yates v. Boteler*, CCA, 9, 163 F. (2) 953. The statement must be communicated by the mercantile agency to the creditor. *In re Muscara*, WD, Pa., 9 ABR, NS, 276, 18 F. (2) 606."

.

“4. THE CREDITORS WHO EXTENDED THE CREDIT DID NOT RELY UPON THE STATEMENT.

“This appears obvious since it was not communicated to them, they never saw and never received a copy of it. All they received was a written opinion from the mercantile agency as to the financial rating of the bankrupt’s husband. It is essential that the creditor extending the credit must have relied upon the statement. *In re Leonard*, SD, Ca., 122 F. S. 214; *In re Day*, DC, Mass., 28 ABR, NS, 115, 11 F. S. 400; *In re Stafford*, DC, Conn., 36 ABR, 746, 226 F. 127. It seems plain that the creditors involved here did not rely upon this financial statement, but rather upon the mercantile agency’s opinion of the husband’s financial rating, in extending the credit they did.”

No. 14707

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HOWARD E. ROGERS, doing business as HOWARD E. ROGERS
Co.,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate of
HOWARD E. ROGERS, etc.,

Appellee.

APPELLEE'S REPLY BRIEF.

ERNEST R. UTLEY,
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MAY 25 1955

PAUL P. O'BRIEN, CLERK

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HOWARD E. ROGERS, etc.,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of the Case.

The record discloses that prior to bankruptcy herein, the bankrupt was engaged in the produce business, and on or about September 15, 1952, the bankrupt made and delivered a financial statement, in writing, to the Produce Reporter Company, a national mercantile agency, which publishes financial ratings of persons engaged in the produce business. [R. beg. p. 25.]

This statement was given to the Produce Reporter Company by the bankrupt for the purpose of securing and maintaining credit.

This financial statement, which was admittedly false, was the basis for the specification of objection to the bankrupt's discharge.

Question Presented.

This appeal attacks the correctness of the Court's order denying the bankrupt's discharge upon the ground set forth in Specification No. 1 of said objections, alleging a violation under Section 14c(3) of the Bankruptcy Act.

Summary of the Evidence.

That while the bankrupt was engaged in the produce business and on September 15, 1952, he made and published a materially false financial statement, in writing, respecting his financial condition. This statement was given to the Produce Reporter Company by the bankrupt for the purpose of securing and maintaining a rating of credit.

That while the financial statement, Objector's Exhibit 1, shows a net worth of \$57,484.37 as of July 31, 1952, yet an audit of the books of the bankrupt as of this date shows a hopelessly insolvent condition. [See testimony of Mr. Mulherin, beg. R. 32.]

In the Produce Reporter Company's Blue Book of 1952, published about April 1, 1952, the financial rating of the bankrupt was "25M or \$25,000.00" [R. pp. 28-29]; that although the Produce Reporter Company received this financial statement on September 15, 1952, it did not then change this financial rating; although the bankrupt's rating was changed on October 24, 1952 [see R. p. 43], it still showed a good condition which it would not have shown had the financial statement above mentioned re-

flected the true financial condition of the bankrupt. [R. pp. 50-51.]

Mr. Mulherin's report clearly shows that the bankrupt was insolvent at the time this financial statement was given, which substantiates the Referee's finding that the financial statement was knowingly false.

That between November 1 and 20, 1952, Williams Farms Company, Inc., sold to the bankrupt [R. p. 38] on credit, between \$25,000.00 and \$30,000.00 of fresh carrots; that in extending credit to the bankrupt, Williams Farms Company, Inc., examined the Blue Book and weekly reports, of the Produce Reporter Company, showing the credit rating of the bankrupt and relied upon the rating given the bankrupt in the Produce Reporter Company's Blue Book and weekly reports, to which it was a subscriber [R. p. 56], and would not have extended credit to the bankrupt had his true financial condition been shown; that while Williams Farms Company, Inc., did not personally see the false financial statement, it did see all of the reports of Produce Reporter Company, Inc., which, as shown, were made up from information received, including the financial statement [R. pp. 55-56], and relied upon same in extending credit.

The testimony of Raymond W. Gordon, T. M. Mulherin and J. E. Miller [R. pp. 25-79, incl.], and the documentary evidence clearly supports the findings of the Referee. [See also Ref. Memo. Op. at R. p. 81.]

ARGUMENT.

**Did the Williams Farms Company, Inc., Rely Upon
the False Financial Statement of the Bankrupt in
Extending Credit to Said Bankrupt?**

The Courts have held upon more than one occasion that where a false financial statement, in writing, is given to a credit agency for the purpose of securing or maintaining the maker's credit rating, and where a creditor relies upon a report of the credit agency in extending credit to the maker of the financial statement, such reliance is sufficient to support a denial of a discharge in bankruptcy where the other elements warranting a denial of a discharge have been proven.

Yates v. Boteler (C. C. 9th), 163 F. 2d 953.

In the above case, Dun & Bradstreet prepared a report, which went out to its subscribers, some of whom later became creditors of Yates, which contained much information not given by the bankrupt, but also accurately embodying the figures that the bankrupt had given to the credit agency. With reference to this, the Court says at page 955:

“The fact that other material was also included, and the possibility that the outside material might have contributed to the granting of credit, does not excuse the appellant for the falsity of the information that he did give out. A creditor's *partial* reliance upon false information given by the bankrupt is sufficient to bar a discharge. 1 Collier on Bankruptcy, 14th Ed. §14.39, p. 1347; *Id.*, 1946 Cum. Supp. p. 199.”

and again the Court says at page 956:

“As we have already seen in connection with the appellant's objections to Finding No. 1, ‘a false

statement made to a mercantile agency *for general use* is unquestionably a basis for the denial of a discharge.' 1 Collier, §14.42, p. 1357, *supra*."

The Court also says at page 956:

"Finally, it is contended that the creditor who relied upon the showing as to the appellant's net worth 'only saw the letter written by Dun & Bradstreet, and not the estimated statement signed by the bankrupt.' The speciousness of this argument is readily discerned when we remember that 'a false statement made to a mercantile agency for general use is unquestionably a basis for the denial of a discharge.' 1 Collier on Bankruptcy, §14.42, p. 1357; *In re Cloutier Bros.*, D. C. Me., 228 F. 569, 570.

Indeed, so unimportant is the *form* in which a false financial statement comes to the attention of the relying creditor, that even a false chattel mortgage has been held to be a 'materially false statement in writing.' *In re Powell*, D. C. Md., 22 F. 2d 239, 240.

2. *The financial statement was given to Dun & Bradstreet by the appellant for the purpose of obtaining credit, and credit was extended to him thereon, particularly by Earle M. Jorgensen Co. which still remains an unpaid creditor in the bankruptcy proceeding in the sum of \$4786.50."*

The only difference between the information furnished by Dun & Bradstreet in the *Yates* case and the information furnished by Produce Reporter Company is that Dun & Bradstreet wrote a letter to its subscribers, which contained much information not contained in the *Yates* financial statement, and in the instant case the information was given out in book form and the information given was by letters or figures, indicating certain things, the

directions in the book showing what each set of letters or figures meant.

Counsel for the bankrupt indicates that the change made by the Produce Reporter Company on October 24, 1952, was the result of the financial statement, but this is not the evidence. The evidence shows that the Blue Book for 1952 was published in April, 1952, and it showed a financial rating of "25M" or \$25,000.00. That the Produce Reporter Company would not show anything on the bankrupt unless there was a reported change in his financial condition; that if there were a reported change the same would appear in the next week's issue [R. pp. 42 and 50]; that although the financial statement was received by Produce Reporter Company on September 15, 1952, there was no noticed change in the status of the bankrupt until October 24, 1952, all of which means that there was nothing in the financial statement to change the rating previously given of the bankrupt of "25M" shown in the Blue Book itself. Had the financial statement stated the true facts, however, there would have been a change. [R. p. 50.]

One cannot read the testimony of Mr. Gordon [Record beginning at p. 25] without seeing that there were other conflicting reports coming in which prompted the report of October 24, 1952. But even so, the bankrupt was still shown as a good risk whereas he would not have been so shown had the financial statement revealed the true facts. [R. p. 50.]

There is no substantial difference between the reports given by Dun & Bradstreet and those given by Produce Reporter Company. Both are mercantile agencies.

1 Collier on Bankruptcy (14th Ed.), p. 1356, Sec. 14.42.

The very purpose for which Williams Farms Company, Inc., subscribed for the Blue Book was to keep informed as to the financial condition of produce dealers, and at the time the bankrupt gave the false financial statement to Produce Reporter Company, he knew that his financial condition, as shown in the false financial statement would be reflected in the reports of the Produce Reporter Company.

A partial reliance on the false statement is sufficient to sustain an objection to the discharge, and there may be a sufficient reliance on the false statement even though the creditor has made an independent investigation of the debtor's financial status. (*In re Banks*, 181 F. 2d 309.)

While there must be at least a partial reliance, as stated in the case of *In re Banks*, above cited, this partial reliance may flow from a report by a mercantile agency as stated by our own Circuit Court in the case of *Yates v. Boteler*, above cited.

And, also, it is not necessary for the creditor who relies upon the false financial statement to make the objection. See *In re Haggerty*, 165 F. 2d 977 at 980, wherein the Court says:

“And, as we said in *In re Ernst*, 2 Cir., 107 F. 2d 760, it is of no significance that the creditor to whom the bankrupt gave the materially false written statement has been paid and is not objecting to the discharge.”

See also:

In re Leonard, 122 Fed. Supp. 214 (this District).

The Referee has made findings, clearly supported by the evidence, and findings of a Referee may be upset only when they are clearly erroneous. [See Referee's remarks, R. p. 81.]

See also:

General Order 47;

Knetzer v. Larkin, 178 F. 2d 532;

In re Leonard, 122 Fed. Supp. 214 (this District).

We submit that it is clear that the bankrupt made and published the false financial statement for the purpose of securing and maintaining credit. The bankrupt knew the purpose for which the Produce Reporter Company would use this financial statement, to-wit: that of fixing his credit rating in its Blue Book. The Referee found that the creditor relied thereon in extending credit. [See Finding (f), R. p. 14.]

The Court concludes [see Conclusions (b) and (c), R. p. 15] that if the financial statement had revealed the true financial condition of the bankrupt the credit would not have been extended.

The Referee, in his Memorandum of Opinion, points out that the bankrupt failed to meet the burden of proof imposed upon him under the law, and the bankrupt has not attempted to answer this rather patent argument.

We respectfully submit that the order appealed from should be sustained.

Respectfully submitted,

ERNEST R. UTLEY,

Attorney for Appellee.

No. 14708

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vs.

OSCAR F. ERICKSON, Appellee.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HEALY & WALCOM,

58 Post Street,
San Francisco, California,

Attorneys for Defendant and Appellant.

PAUL FRIEDMAN,

631 Phelan Building,
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the District Court of the United States, North-
ern District of California, Southern Division

No. 33,005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY, a cor-
poration, Defendant.

COMPLAINT ON INSURANCE POLICY

Plaintiff for a cause of action against Defendant
states and alleges as follows:

I.

That Plaintiff is a citizen of the State of Cali-
fornia.

II.

That Defendant is a corporation duly incorpor-
ated and organized under the laws of the State of
Illinois, and is a citizen of such State, with its prin-
cipal office and place of business at Chicago, Illinois,
and is doing business in the State of California.

III.

That this is an action upon a contract of automo-
bile liability insurance issued by an agent of De-
fendant in the State of California, to Plaintiff that
jurisdiction of this Court is based upon the fact of
the existence of a controversy between Plaintiff
and Defendant as citizens of different States, and
the amount in controversy in this cause of action

exceeds the sum of \$3,000.00 exclusive of interest and costs.

IV.

That on or about the 17th day of December, 1952, in the State of California, in consideration of the payment of a premium therefor, Defendant issued to Plaintiff its policy of automobile insurance for a period of one year, reading as follows:

“II. Coverage C—Medical Payments Insurance To pay all reasonable expenses, incurred within one year from the date of accident, for necessary medical, dental, surgical, ambulance, hospital, professional nursing and funeral services and prosthetic devices to or for any person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the owned automobile or a substitute automobile, while being used by or with the permission of the named insured or spouse, or (2) a non-owned automobile, if the injury arises out of its occupancy or operation by the named insured or spouse or out of its operation for either by a servant.”

“* * * C. Medical Payments—Each person \$2,000.00”

“III. Coverage D—Collision and Upset Insurance. To pay for loss to the owned automobile caused by its collision with another object or by its upset, less the deductible amount stated on the Supplement Page.”

“* * * D. Collision or Upset—Diminishing. Deductible—Actual Cash Value Less \$50.00 Deductible.”

The automobile referred to in said policy of insurance was a 1951 Studebaker Sedan Automobile bearing Motor No. 19458.

V.

That on or about the 15th day of February, 1953, while Plaintiff's wife, Birdella Erickson, was driving said insured vehicle in the State of California, she suffered a collision and upset which resulted in personal injuries to herself and to Plaintiff, who was riding with said Birdelle Erickson in said vehicle at that time, and in damage to the vehicle which Plaintiff is informed and believes and therefore alleges on information and belief, amounts to total destruction thereof. The personal injuries required necessary medical, surgical, ambulance, hospital and nursing expenditures and indebtedness to be incurred by Plaintiff for himself and his wife.

VI.

Plaintiff is informed and believes and therefore alleges on information and belief that the loss suffered by him in the destruction of his automobile is the value of said vehicle, which he is informed and believes and therefore alleges on information and belief was in the sum of \$2,000.00 at that time. Plaintiff is informed and believes and therefore alleges on information and belief that indebtedness incurred and to be incurred by Plaintiff for medical bills for his wife, Birdelle Erickson, and himself approximates \$2,000.00.

VII.

Plaintiff has made claim upon Defendant to pay for the loss of his automobile and for the medical expenses incurred as a result of this collision and upset, and although Plaintiff has duly performed all the conditions of the contract of insurance to be performed on his part, Defendant refuses and has failed to perform the terms of the contract of insurance herein alleged, and has failed and refused to make any payment or reimbursement to Plaintiff pursuant to the terms of said insurance contract, and have tendered to Plaintiff the return of premium paid by him and have declared that they are not bound by their contract, thereby waiving the presentation by Plaintiff of any formal proofs of claim or loss.

Wherefore, Plaintiff prays judgment against the Defendant in the sum of \$4,000.00 for costs of suit, and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ PAUL FRIEDMAN,
Attorney for Plaintiff

Duly Verified.

[Endorsed]: Filed August 20, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ON
GROUND OF LACK OF JURISDICTION
UNDER RULE 12(b)

To the Plaintiff above named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that the defendant Allstate Insurance Company, a corporation, will bring the attached motion on for hearing before the above entitled Court, on the 7th day of December, 1953, at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel can be heard.

Dated: November 23, 1953.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Memorandum of Authorities

Rule 7(b), Federal Rules of Civil Procedure.

Rule 12(b), Federal Rules of Civil Procedure.

MOTION TO DISMISS ON GROUND OF LACK
OF JURISDICTION UNDER RULE 12(b)

The defendant Allstate Insurance Company, a corporation, under Rule 12(b), Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than Three Thousand and No/100 Dollars (\$3,000.00), exclusive of interest and costs.

It appears from the complaint that on the 15th day of February, 1953, the casualty involving the loss of the automobile occurred, and plaintiff alleges on information and belief his automobile was totally destroyed; that said complaint was filed on August 20, 1953, some six (6) months after the alleged casualty and plaintiff must know the value of his loss, by the total destruction of his automobile, and the same should be set forth herein.

II.

That the alleged casualty causing injury to Birdella Erickson occurred on February 15, 1953, and plaintiff alleges on information and belief medical bills incurred and to be incurred will be in the sum of Two Thousand and No/100 Dollars (\$2,000.00). Plaintiff must certainly know the amount of the expenditures, and that it should be set forth in the complaint.

III.

That on information and belief it appears that the actual damage to the automobile, and the medical expenses incurred and to be incurred is sub-

stantially less than the jurisdictional limits of this Court.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 24, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 7th day of December, in the year of our Lord one thousand nine hundred and fifty-three.

Present: the Honorable Louis E. Goodman, District Judge.

This case came on regularly this day for hearing of motion to dismiss. After hearing Leo J. Walcom, Esq., for defendant, and Paul Friedman, Esq., for plaintiff, Ordered motion to dismiss be Denied. Ordered that defendant have five (5) days within which to answer, and that defendant have five (5) days within which to answer complaint.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION

To the Plaintiff above named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that the defendant Allstate Insurance Company, will, on the 12th day of July, 1954, at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel can be heard, in the Law and Motion Department of the above entitled Court, bring the attached motion before this Court.

Dated: July 6, 1954.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Motion to Dismiss on Ground That Plaintiff Has
Failed to Answer Interrogatories Propounded
by Defendant

The defendant move the court as follows:

To dismiss the action on the ground that plaintiff has failed to serve upon defendant answers to interrogatories submitted under Rule 33, after proper service of such interrogatories upon plaintiff by defendant.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of July, in the year of our Lord one thousand nine hundred and fifty-four.

Present: the Honorable O. D. Hamlin, District Judge.

This case came on regularly this day for hearing of motion to dismiss. After hearing Paul Friedman, Esq., attorney for plaintiff, and John J. Healy, Esq., attorney for defendant, Ordered that plaintiff answer interrogatories 3, 4, and 8, and that defendant have five (5) days thereafter to plead, to commence from receipt of answers to interrogatories. Ordered motion to dismiss for failure to answer interrogatories be Denied.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant Allstate Insurance Company, a corporation, and in answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Answering the allegations of Paragraph III of

said complaint, this answering defendant denies that the amount in controversy exceeds the sum of \$3,000.00 exclusive of interests and costs.

II.

Answering the allegations of Paragraph V of said complaint, this answering defendant denies that said vehicle was totally destroyed in the said collision.

III.

Answering the allegations of Paragraph VI of said complaint, this answering defendant denies each and every, all and singular, generally and specifically, the allegations contained therein.

IV.

Answering the allegations of Paragraph VII of said complaint, this answering defendant denies that plaintiff has duly performed all the conditions of the contract of insurance to be performed on his part and admits that it has refused to make any payment under the terms of said contract and has returned the premium paid for said policy and notified plaintiff that the policy is void in its inception because of breach of warranty in that plaintiff misrepresented to defendant in his application for the insurance policy in question that he had not had previous automobile insurance cancelled.

As and for a Second, Separate, Distinct and Further Answer and Defense to the Complaint of Plaintiff, this Answering Defendant alleges:

I.

That on the 17th day of December, 1952, plaintiff applied at the office of the defendant at Santa Rosa, California, for a policy of insurance; at the time of said application plaintiff was asked whether or not during the past two years an insurer had cancelled or refused automobile insurance to him and answered in writing in the negative; thereafter there was issued to plaintiff a policy of automobile insurance No. S-436437-12-18 on a Studebaker De-Luxe Four-Door Sedan, commencing on the 17th day of December, 1952, and for a period of one year thereafter; that said policy of insurance issued by plaintiff to defendant stated, among other things, the following:

"The Allstate Insurance Company, a stock company, Home Office Chicago, in reliance upon the declarations on the supplement page and subject to the limits of liability exclusions, conditions and other terms of this policy and for payment of the premium, Allstate agrees with the name insured * * *

* * * * *

Supplement Page.

"7. During the past two years with respect to the named insured or to any member of his household no insurer has cancelled or refused any automobile insurance. * * *

"The Following Conditions Apply To All Coverages:

"1) Effective policy acceptance:

"By acceptance of this policy the named insured agrees that the declarations on the supplement page

are his agreements and representations and that the declarations on the supplement page are his agreements and representations and that this policy embodies all agreements relating to this insurance existing between himself and Allstate or any of its agents."

II.

That the representations of the plaintiff to the defendant in writing that no insurer had ever cancelled any automobile insurance issued or refused any automobile insurance to the applicant or to any of his household were false in that on the 15th day of December, 1952, the State Farm Insurance Company notified in writing that it was then cancelling an existing policy of automobile insurance issued to him and refusing to extend coverage thereafter because of an undesirable risk record; that defendant would not have issued to plaintiff the said policy of insurance in controversy had it been truthfully informed by him that he previously had automobile insurance cancelled and further coverage refused.

Wherefore, this answering defendant prays that plaintiff take nothing by his complaint and that defendant have judgment thereon, for costs of suit and for such other and further relief as to the court may seem meet.

HEALY & WALCOM,

/s/ By LEO J. WALCOM,

Attorneys for Defendant

Duly Verified.

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

OPINION

Hamlin, District Judge.

This is an action to recover upon an automobile insurance policy issued by the defendant, Allstate Insurance Company, to the plaintiff, Oscar F. Erickson. The defendant seeks to avoid liability by declaring the policy void from the date of issuance because of the alleged falsity of a material representation made by the plaintiff in the policy, which alleged false representation was relied upon by the defendant in issuing the policy to the plaintiff.

The representation in question is one of the printed "Declarations" on the "Supplement Page" of the policy, and reads as follows: "During the past two years, with respect to the named insured or to any member of his household, no insurer has cancelled or refused any automobile insurance nor has any license or permit to drive an automobile been suspended, revoked or refused." The policy contains certain printed conditions, among which is the following: "1. Effect of policy acceptance: By acceptance of this policy the named insured agrees that the Declarations on the Supplement Page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents." The application for the policy, which was signed by the plaintiff, contains the following printed question among others: "Has

any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household? [] Yes. No. [x].” The insurance policy was issued by the defendant, in reliance on these statements, to the plaintiff effective 12:01 a.m. December 18, 1952. The application for insurance was made about 6 p.m. on December 17, 1952, shortly after the plaintiff had received a letter from the State Farm Mutual Automobile Insurance Company with whom he was then insured. This letter was dated December 15, 1952, and read: “It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy * * * [Your policy] is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952, and no further protection will be afforded after that date.” A check for the unearned premium on the policy was enclosed in the letter and cashed some time later by the plaintiff. On February 15, 1953, the automobile covered by the Allstate policy was involved in a collision, as a result of which the automobile was a total loss and certain medical and hospital bills were incurred by the plaintiff and his wife.

The receipt of the letter by the plaintiff shortly before he made application for the policy here sued upon is the sole ground upon which the defendant rests its contention that the representations in the application and policy were false. The principal question thus raised is whether the receipt of a letter from an insurer stating that an existing policy “is being cancelled” effective at a future date

renders false a representation that "no insurer has cancelled or refused any automobile insurance" made to another insurer after receipt of the letter but before the future effective cancellation date.

No authority dealing with this question has been submitted by counsel in this case. It may be conceded that the insurer could have asked the applicant whether he had received notice that any policy held by him was being cancelled, and that if an affirmative answer had been given the insurer would not have issued the policy which is here sued upon. But a plain reading of the representations disclose that this information was not called for, and that the representations were not in fact false. It is well settled that the language of an insurance policy is to be construed most strongly against the insurer who wrote that language. *California Civil Code* §1654; *Island vs. Fireman's Fund Indemnity*, 1947, 30 Cal. 2d, 184, P.2d 153; *Farmers Automobile Inter-Insurance Exchange vs. Calkins*, 1940, 39 Cal.App. 2d 390, 103, P.2d 230; *Woodman vs. Pacific Indemnity Co.*, 1939, 33 Cal.App. 2d 321, 91, P.2d 898. The insurer here was a national company doing business throughout the nation. It maintains a booth in various Sears stores for the purpose of selling insurance, and the policy in question was issued at such a booth. It was in a position to know of the possibility that facts such as prevail here might arise. Any printed questions or declarations that the insurance company felt were proper or desirable could have been printed in the application and

policy. It chose to phrase the language used in the manner set out above. If it desired more detailed or other information, it could have asked for it. The answer of the plaintiff, taken literally, was not false. The plaintiff did not make these statements with bad faith or with any intent to deceive or falsify. When he stated that his previous insurance had not been cancelled, he was not in error. It was being cancelled some ten days later. Therefore, there was no false representation or breach of warranty by the insured, and the insurer will not be permitted to void the policy from its inception on that ground.

Plaintiff's complaint alleges, and prays for, damages in the sum of \$4,000. Defendant argues that jurisdiction cannot be retained by this court, since the damages proved on the trial amounted to less than \$3,000. The rule is that the amount in controversy is controlled by the claim in the complaint, if apparently made in good faith, and the inability of the plaintiff to recover over \$3,000 and a judgment for less than that sum, do not oust this court of jurisdiction. *Saint Paul Mercury Indemnity Co. vs. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 1938. There was no showing that the plaintiff's claim for an amount in excess of \$3,000, although incorrect, was not made in good faith, and hence the jurisdiction of this court is established.

The Court finds that the damages suffered by the plaintiff amount to \$2,067.72. This includes the value of the automobile and the medical and hospital expenses.

Let judgment be entered accordingly. Plaintiff to prepare findings of fact and conclusions of law.

Dated: November 29, 1954.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER TO RE-
OPEN CAUSE FOR FURTHER AUTH-
ORITIES AND EVIDENCE

To the Plaintiff Above Named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that on Thursday, the 16th day of December, 1954, at the hour of 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Oliver D. Hamlin, the defendant herein will move said Court for an order setting aside the submission and decision in the above entitled action and to allow presentation of further evidence and authorities on the question of the point raised in the decision heretofore rendered by this Court concerning whether or not the letter of State Farm Mutual of December 15, 1952, addressed to the plaintiff, constituted a cancellation, which would make a misrepresentation on the part of plaintiff in

discussed. The language from the Moldenhauer case, which is quoted at the top of Page 8, with emphasis by underlining, stated that State Farm Mutual Insurance Company had before plaintiff (Allstate) issued its policy, notified Moldenhauer that it was cancelling his insurance and he was informed that the State Farm policy was cancelled because of the number of small accidents in which he had been involved. This portion of the opinion at page 664 thereof, would certainly constitute the authority that at the time that the representation was made that "no insurer had cancelled or refused any automobile insurance," after receipt by the applicant of the letter notifying him of cancellation, but before the effective date of cancellation, was, in fact, a cancellation within the meaning of the inquiry set forth in the application. In order that there should be no question in the mind of the Court, we have procured the transcript of the testimony in the case of Allstate Insurance Co. vs. Moldenhauer, *supra*, which was pending in the District Court of the United States, for the Eastern District of Wisconsin, being numbered therein 4597. We desire to make said transcript available to the Court and counsel for reference, and particularly call to the attention of the Court the facts in the Moldenhauer case, which are entirely identical with those in the instant case.

The judgment in the Moldenhauer case was for the plaintiff, Allstate Insurance Company, and on appeal to the United States Court of Appeals, for the Seventh Circuit, was affirmed therein. With re-

ference to the testimony from the official transcript of record filed in the United States Court of Appeals, for the Seventh Circuit, it appears that the State Farm Mutual Insurance Company wrote Mr. Moldenhauer under date of March 31, 1947, as follows:

“ ‘Dear Mr. Moldenhauer:

“ ‘It is our desire to be relieved of liability for insurance on the above numbered policy.

“ ‘Policy No. 14791-NS-49 is being cancelled effective 12:01 a.m., Standard Time, April 6, 1947, and no further protection will be provided on your 1936 DeSoto four door sedan after that date.

“ ‘The \$11.99 returnable from this cancellation is being sent to your agent for his disposition.

“ ‘We regret that we are unable to be of service to you.

“ ‘Yours very truly,

“ ‘Underwriting Department.’ ”

(Tr. p. 23, ff. 41)

On April 4, 1947, Moldenhauer went to Allstate Insurance Company for insurance, although he knew that his policy had been cancelled effective April 6, 1947 and after receipt of the March 31, 1947 letter from State Farm Mutual. In the Transcript, page 24, ff. 42-44, it is stated:

“Q. Now, on April 4, 1947 you went to the Allstate Insurance Company for insurance, did you not? “A. The 4th, yea.

“Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

"A. Yeah.

"Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

"The Court: What is the date of the State Farm letter?

"Mr. Kluwin: The letter of March 31, 1947, which is Allstate's Exhibit 2.

"A. What was that?

"The Court: You may answer the question.

"(Whereupon the reporter read the pending question.)

"A. I had received a letter that I would be cancelled the 6th.

"Mr. Kluwin:

"Q. And it was your desire to get new insurance to go into effect on April 6th; is that correct?

"A. That is what I wanted, yeah.

"Q. So that in response to that letter you went to the Allstate to try to get insurance?

"A. I had figured on insuring with them before, but now I was compelled to get insurance. I didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

"Q. If you hadn't received this letter from the State Farm Mutual, referred to as Exhibit 2, when would your insurance have expired; do you know?

"A. That I don't know for sure.

"Q. Some months later?

"A. I don't know for sure.

"Q. But in response to this letter you then went

to the Allstate's office in the Sears, Roebuck Store?

"A. That is why I went down there, yeah."

Mr. Moldenhauer, like Mr. Erickson in the instant case, falsely stated that his policy had not been cancelled, when in truth and in fact it had been, and he had received the cancellation letter. In the Transcript, pages 21 and 22, ff. 38 and 39, and pages 24 and 25, ff. 43-46, it is said:

"Mr. Kluwin:

"Q. Now, Mr. Moldenhauer, before you took out this policy with the Allstate Insurance Company, you were insured by the State Farm, were you not?

"A. I was what?

"Q. You were insured with the State Farm Insurance Company? "A. State Farm Mutual.

"Mr. Barly: Excuse me, John; he doesn't hear very well. Will you get fairly close to him?

"Mr. Kluwin: If I may stand here, if the court please.

"The Court: I think if you were closer, over there.

"Mr. Kluwin:

"Q. Now, Mr. Moldenhauer, do you have the policy that was issued by the State Farm Insurance Companies that was in effect just before you took out insurance of the Allstate?

"A. I haven't got it now any more.

"Q. As far as you know you destroyed that policy; is that correct? "A. Yeah.

"Q. In any event the policy that you had with them was cancelled, was it not?

"A. Not at the day I insured with Allstate.

“Mr. Kluwin: I move that that answer be stricken as not responsive.

“The Court: Well, what is ‘cancellation’? Was there a failure of renewal in this case or was there an outright cancellation?

“Mr. Kluwin: There may be an issue here but I don’t think there is any dispute about the fact that the policy was cancelled. Isn’t that true, Mr. Barly?

“Mr. Barly: I have no proof of it. We can’t find any letter that the company had written to him.

“Mr. Kluwin: May I ask this question, then, and renew the objection later, if the court please:

“Q. Did you ever receive a letter from the State Farm Insurance Companies advising you that they were cancelling the policy?

“A. They said they would cancel it the 6th.

“Q. You received such a letter?

“A. Yeah.

* * * * *

“Q. Now, on April 4, 1947 you went to the Allstate Insurance Company for insurance, did you not? “A. The 4th, yeah.

“Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

“A. Yeah.

“Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

“The Court: What is the date of the State Farm letter?

"Mr. Kluwin: The letter of March 31, 1947, which is Allstate's Exhibit 2.

"A. What was that?

"The Court: You may answer the question.

"(Whereupon the reporter read the pending question.)

"A. I had received a letter that I would be cancelled the 6th.

"Mr. Kluwin:

"Q. And it was your desire to get new insurance to go into effect on April 6th; is that correct?

"A. That is what I wanted, yeah.

"Q. So that in response to that letter you went to the Allstate to try to get insurance?

"A. I had figured on insuring with them before, but now I was compelled to get insurance. I didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

"Q. If you hadn't received this letter from the State Farm Mutual, referred to as Exhibit 2, when would your insurance have expired; do you know?

"A. That I don't know for sure.

"Q. Some months later?

"A. I don't know for sure.

"Q. But in response to this letter you then went to the Allstate's office in the Sears Roebuck Store?

"A. That is why I went down there, yeah.

"Q. And did you see a man by the name of Mr. Mielke there? "A. Yeah.

"Q. And at that time did he take an application from you? "A. Yeah.

"Q. And did he ask you certain questions?

"A. The question was, have you been cancelled?

"Q. No. Did he ask you certain questions?

"A. Well, some questions, sure.

"Q. And you made certain answers?

"A. Yeah.

"Q. And was one of these—in one of these questions he asked you whether you had ever had any insurance cancelled, did he not?

"A. I said not as far as yet; that's my words.

"Q. Did you tell him that you had received the letter from the State Farm Mutual?

"A. He didn't inquire and I didn't answer him.

"Q. I say, did you tell him?

"A. No.

"Q. You didn't tell him that you received a letter that your policy was being cancelled effective April 6th, did you? "A. No.

"Q. And at that time you signed the application after it had been filled out; is that right?

"A. Yeah.

"Q. I show you what has been marked here as Allstate's Exhibit No. 4, and ask you if at the lower left-hand corner your signature, 'Max W. Moldenhauer,' appears? "A. If what?

"Q. If that is your signature?

"A. Yeah.

"Q. And that is the application that you signed?

"A. Yeah."

The memorandum decision of the District Court was as follows: (Tr. pgs. 43-44, ff. 110):

"United States District Court.

“* * * (Captions—4597-4612) * * *

“Memorandum Decision.

“(Endorsed: ‘Filed June 21, 1950. B. H. Westfahl, Clerk.’)

“Upon a careful consideration of the evidence submitted herein and of the arguments and briefs submitted by counsel, I have concluded that the defendant Allstate Insurance Company is entitled to a judgment declaring that the policy of automobile liability insurance issued to Max W. Moldenhauer was void by reason of his failure to disclose material facts, which failure to disclose increased the risk, and that the Allstate Insurance Company incurred no liability under said policy.

“The defendant Allstate Insurance Company is entitled to costs to be taxed by the Clerk of Court.

“Counsel for defendant Allstate Insurance Company will prepare findings of fact and conclusions of law and a form of judgment and present same for settlement on ten (10) days’ notice to counsel for the other parties.

“Dated, Milwaukee, Wisconsin, this 21st day of June, A. D. 1950.

“Robert E. Tehan,

“U. S. District Judge.”

The Findings of Fact and Conclusions of Law, based on the foregoing evidence, relates, in part, as follows (Tr. pgs. 45 and 46):

“* * * 6. That prior to the issuance of said policy of insurance the said Max W. Moldenhauer executed an application for insurance in which he de-

clared that no insurer had ever cancelled any automobile insurance which it had issued to him.

"7. That Allstate Insurance Company issued Policy No. M002734 based upon the express warranty made by the said Max W. Moldenhauer, which express warranty read as follows: 'Has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household, to which question the said Max W. Moldenhauer answered "No."'

"8. That State Farm Mutual Insurance Company of Bloomington, Illinois, previous insurer of the said Max W. Moldenhauer, notified the said Max W. Moldenhauer on April 6, 1947, that it was cancelling his insurance, and that one, Mrs. Lehman, wife of the agent for State Farm Mutual Insurance Company, informed the said Max W. Moldenhauer that said policy of insurance was being cancelled because of the number of small accidents in which the said Max W. Moldenhauer had been involved."

The Conclusions of Law related in part as follows (Tr. p. 46):

"1. That the policy of automobile liability insurance No. M002734 issued April 6, 1947, by Allstate Insurance Company to Max W. Moldenhauer, and the subsequent renewal policy issued April 6, 1948, are null and void from the date of their original issuance because of the failure on the part of the said Max W. Moldenhauer to disclose material facts, which failure to so disclose increased the risk."

Judgment followed.

As heretofore stated, the complete transcript of these proceedings are available for the study of the Court and Counsel.

It is respectfully submitted the Court misconstrues the plain import of the letter of Mr. Cowden, Exhibit 2 in the instant case, which reads as follows:

“December 15, 1952

“Mr. O. F. Erickson and

“Mrs. Birdella A. Erickson

P. O. Box 812

Booneville, California

“Dear Mr. and Mrs. Erickson:

“Re: Cancellation of Policy No. 528848-B04-05

“It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

“Policy No. 528848-B04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

“Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

“Very truly yours,

/s/ “G. M. Cowden,

Underwriting Superintendent”

There is no question that this letter extended coverage through December 27, but prior to the time

that Erickson applied to Allstate Insurance Company and signed the application, he knew that this policy had been Cancelled, and that he had been Refused further coverage. Regardless of the effective date of the cancellation, he had been cancelled and so advised. There was no other reason for him to seek insurance from Allstate Insurance Company other than to replace cancelled insurance. Therefore, to give effect to the continuance of coverage by State Farm Mutual Insurance Company until December 27 is to overlook entirely the fact that the policy had meanwhile been cancelled. To hold otherwise would be contrary to the findings of another United States District Court, whose decision has been affirmed by the United States Court of Appeals, for the Seventh Circuit.

All that State Farm Mutual Insurance Company did was to give notice of cancellation. The fact as the witness G. M. Cowden related, ten (10) days notice is required by the policy to terminate the effective period of the coverage does not vitiate the fact that there was an unequivocal present intention expressed to Erickson in the letter of December 15, which, of course, he received before he applied to Allstate Insurance Company.

As said in 29 Am. Jur. p. 263:

“* * * notice by the insurer to the insured need not be in any particular form in the absence of a statute or policy provision prescribing such form, and is sufficient so long as it positively and unequivocally indicates to the insured that it is the intention of the company that the policy shall cease

to be binding as such upon the expiration of the stipulated number of days from the time when its intention is made known to the insured."

In 14 Cal. Jur. p. 438 it is said:

"* * * under a policy requiring notice for a stated time it is only necessary positively to indicate the insurer's intention that the policy shall cease to be binding upon the expiration of the stipulated period after such intention is communicated, if such a notice expresses a present resort to the cancellation privilege to become effective at the time fixed."

In *American Glove Company vs. Pennsylvania Ins. Co.* 15 Cal. App. 77, the insurance company wrote on April 9, 1906 as follows:

"Gentlemen:—We desire to terminate our liability under Policy No. 170062 * * * The policy will be cancelled on our books on the 14th inst., five days from date * * *"

It is further stated in said case (page 80):

"Plaintiff in the same connection argues that the notice of April 9th was not a notice of cancellation, but merely of an intention to cancel, and therefore insufficient. But the notice expressed defendant's present 'desire to terminate liability.' The policy required 'five days' notice of such cancellation,' and for this reason the form of expression was adopted that the policy 'will be canceled on our books on the 14th inst., five days from date.' Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company desiring then to cancel the policy and to terminate

its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective."

* * * * *

(Page 81) "It is clear that such cases are inapplicable to the case at bar. Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice."

* * * * *

(Page 82) "Even where the policy permits immediate cancellation upon notice, an unequivocal notice that the company will, on and after a certain future date, consider the policy canceled is held effective. The assured upon whom such a notice was served would be left in no doubt of the purposes of the company. He could not fail to understand that it was notice of the cancellation of the policy, to take effect on the day named in the notice."

There was no equivocal notice of cancellation by State Farm Mutual Insurance Company. Its letter was entitled "Cancellation of Policy", and Erickson was notified that he was being cancelled, effective date to be December 27. There is no ambiguity in the cancellation notice nor is there in the application of Allstate Insurance Company, which was the identical application in the Moldenhauer case as well. When Erickson, like Moldenhauer, received the State Farm Mutual letter of cancellation, and

informed the Allstate Insurance Company representative that he had not had a policy cancelled or refused, he was guilty of a misrepresentation and a material one, as the testimony of the defendant was uncontradicted that the policy would not and could not have been bound had a truthful answer been given to the inquiry set forth in the application.

Dated: December 8, 1954.

Respectfully submitted,

HEALY & WALCOM,
/s/ By LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ORDER

The Court having heard and considered the further evidence and authorities presented in the above entitled cause, it is hereby ordered that the motion of the defendant, Allstate Insurance Company, for an order setting aside the decision heretofore rendered in this action, is denied.

Dated: December 28, 1954.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 14th day of October, 1954, and continued on the 15th day of October, 1954, before the court sitting without a jury, a jury having been expressly waived, Paul Friedman appearing as counsel for the Plaintiff, and Healy and Walcom appearing as counsel for the Defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. That all of the allegations contained in paragraphs I and II of the complaint as filed herein are true;

2. That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of costs and interest;

3. That this is a civil action, and that the Court has jurisdiction of this action based upon the existence of a controversy between citizens of different states in which the amount in controversy exceeds the sum of \$3,000.00 exclusive of costs and interest;

4. That all of the allegations contained in para-

graphs IV, V and VII of the complaint as filed herein are true;

5. That all of the allegations contained in paragraph VI of the complaint as filed herein are true, except that the total damages suffered by the plaintiff are in the sum of \$2,067.72;

6. That all of the allegations contained in paragraph I of the second, separate, distinct and further answer and defense to the complaint of plaintiff contained in the answer of defendant are true;

7. That a letter dated December 15, 1952, from the State Farm Mutual Automobile Insurance Company, with whom the plaintiff then had a policy of automobile insurance, was sent to the plaintiff and received by him before he made application to the defendant on December 17, 1952, for a policy of insurance, and that this said letter read as follows:

“Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy No. 528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

Policy No. 528848-B04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This

represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,

G. M. Cowden,
Underwriting Superintendent"

8. That the check for \$11.35 mentioned above in paragraph VII of the Findings of Fact was received and cashed by the plaintiff, Oscar F. Erickson, some time after the date of December 18, 1952;

9. That in issuing this said insurance policy to the plaintiff, the defendant did in fact materially rely on the representation made by the plaintiff in the policy and on the negative answer of the plaintiff to the question asked of him at the time of his application for the said insurance policy.

From the foregoing findings of fact the Court makes the following

Conclusions of Law

1. That plaintiff is entitled to judgment against the defendant in the sum of \$2,067.72 together with his costs and disbursements incurred and expended herein.

Let judgment be entered accordingly.

Dated this 6th day of January, 1955.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed January 6, 1955.

In the District Court of the United States, Northern District of California, Southern Division

No. 33005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY, a corporation, Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 14th day of October, 1954, and continued on the 15th day of October, 1954, before the Court sitting without a jury, a jury having been expressly waived, Paul Friedman appearing as counsel for the plaintiff, and Healy and Walcom appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises and having duly made and filed its findings of fact and conclusions of law, and good cause now appearing:

It Is Hereby Ordered, Adjudged and Decreed:

1. That Plaintiff have judgment against the Defendant in the sum of \$2,067.72.
2. That Plaintiff have judgment against the Defendant for his costs and disbursements incurred and expended herein.

Dated this 6th day of January, 1955.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Entered January 7, 1955.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the defendant Allstate Insurance Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain decree and judgment entered in the above entitled action on the 6th day of January, 1955.

Dated: January 28, 1955.

HEALY & WALCOM,

/s/ By JOHN J. HEALY,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant Allstate Insurance Company, a corporation, designates the entire record proceedings and evidence to be contained in the record on appeal in this action, including the following:

1. Complaint on Insurance Policy.
2. Motion to Dismiss on Ground of Lack of Jurisdiction under Rule 12(b).
3. Notice of Motion to Dismiss on Ground of Lack of Jurisdiction under Rule 12(b).
4. Order Denying Motion to Dismiss.
5. Answer to Complaint.
6. The entire transcript of the proceedings, evidence, and testimony of all of the witnesses produced at the trial.
7. All exhibits offered by plaintiff and defendant and admitted in evidence at the trial.
8. Opinion of Judge O. D. Hamlin.
9. Notice of Motion for Order to Reopen Cause for Further Authorities and Evidence.
10. Points and Authorities in Support of Motion to Reopen Cause for Further Authorities and Evidence.
11. Order Denying Motion to Reopen Cause for Further Authorities and Evidence.
12. Findings of Fact and Conclusions of Law.
13. Judgment.
14. Notice of Appeal.
15. This Designation.

Dated: January 28, 1955.

HEALY & WALCOM,
/s/ JOHN J. HEALY,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL TO STAY EXECUTION

Whereas, the Defendant in the above entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against said defendant in said action, in the District Court of U. S. for the Northern District (Southern Division) in favor of the plaintiff in said action on the 6 day of January 1955 for Three Thousand and 00/100 Dollars (\$3,000.00), costs of suit, and

Whereas, the appellant is desirous of staying the execution of said judgment so appealed from,

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, American Motorists Insurance Company, a corporation organized and existing under the laws of the State of Illinois, and duly licensed for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the State of California, does hereby acknowledge itself justly bound in the sum of Three Thousand and 00/100 Dollars (\$3,000.00) being the amount named in the said judgment; that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may

be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the judgment in the Court from which the appeal is taken, judgment may be entered in the said action on motion of respondent and without notice to the undersigned surety in their favor against the surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

In Witness Whereof, the said American Motorists Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact, and its Corporate Seal to be hereunto affixed at San Francisco, California, this 26 day of January 1955.

AMERICAN MOTORIST INSURANCE COMPANY,

[Seal] /s/ A. R. McCORD,
Attorney in Fact

Approved: February 1, 1955.

/s/ O. D. HAMLIN,
United States District Judge

Duly Verified.

[Endorsed]: Filed February 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE TRANSCRIPT AND DOCKET CASE

Good Cause Appearing Therefor,

It Is Hereby Ordered that the Court Reporter of this Court may have to and including the first day of April, 1955, to transcribe and prepare the Record on Appeal as heretofore designated by Defendant Allstate Insurance Company, and to docket the same in the United States Court of Appeals for the Ninth Circuit.

Dated: March 10, 1955.

/s/ O. D. HAMLIN,

Judge of the District Court

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for appellant:

Complaint.

Notice of motion to dismiss with motion attached.
Minutes of December 7, 1953.

Notice of motion to dismiss with motion attached.
Minutes of July 12, 1954.

Answer to complaint.

Opinion.

Notice of motion for order to reopen cause for further authorities and evidence with points and authorities attached.

Order denying motion to reopen cause, etc.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Designation of record.

Cost bond on appeal.

Order extending time to docket appeal.

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11.

Defendant's exhibits A, C and D.

One volume of Reporter's transcript of trial.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this....day of March, 1955.

C. W. CALBREATH,
Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 33005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Friday, October 15, 1954

Before: Hon. Oliver D. Hamlin, Judge.

Appearances: For the Plaintiff: Paul Friedman, Esq. For the Defendant: Healy and Walcom, by Leo J. Walcom, Esq., 68 Post St., San Francisco, California. [1*]

The Clerk: Erickson vs. Allstate Insurance Company.

Will respective counsel please state their appearance for the record?

Mr. Friedman: Paul Friedman, 531 Phelan Building, for the Plaintiff, Oscar Erickson.

Mr. Walcom: Healy and Walcom, by Leo Walcom, 68 Post Street, San Francisco, for the Defendant Allstate Insurance Company.

The Court: All right, gentlemen.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Friedman: Your Honor, may I make a brief opening statement?

Your Honor, this is an action by Oscar Erickson, who is seated in the courtroom here, to recover on a policy of automobile insurance that he had taken out with Allstate, the Defendant, on or about the 17th day of December, 1952. I will come to the damages in a moment.

The Defendant Allstate has refused to pay the damages alleged to have been suffered by Mr. Erickson and his wife, Mrs. Erickson, as a result of an accident which occurred on or about the 15th day of February, 1953, approximately three months later.

The Defendant bases the refusal to pay on the grounds that there has been a material misrepresentation on the part [3] of the Plaintiff, Mr. Erickson, to the Defendant's agent at the time of securing the insurance.

The representation alleged to be false by the Defendant is contained in the supplement page within the Allstate Insurance policy which was delivered to the Plaintiffs at the time they secured the insurance, and this clause upon which the Defendant seems to rely most strongly in refusing to pay the insurance is:

"During the past two years, with respect to the named insured"—that is, referring to Oscar Erickson—"or to any member of his household, no insurer has cancelled or refused any automobile insurance

nor has any license nor permit to drive an automobile been suspended, revoked, or refused."

The Defendant contends that inasmuch as at the time the Plaintiff Oscar Erickson appeared at the offices of the Defendant's agent in Santa Rosa, California, that at that time he had received a letter from another insurance company in which he was insured, informing him that on or about the 27th of December, his policy of insurance would be cancelled.

I have secured that letter, finally, tried to get it, finally have gotten it, and it reads as follows. It is dated December 15, 1952, addressed to Mr. Erickson. It says:

"Dear Mr. and Mrs. Erickson: [4]

"Re: Cancellation of policy No. 528848-B-04-05."

This is on the stationery of the State Farm Mutual Insurance Company with which company at that time Mr. Erickson had insurance of the same kind.

"It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-door sedan, Motor No. V-19458.

"Policy No. 528848-B-04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

"Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This

represents the unearned premium returnable from the cancellation of your policy.

“Very truly yours, G. M. Cowden,

“Underwriting Superintendent.”

Now, the issue there in brief is very simple. Mr. Erickson contends, the Plaintiff, that this letter in and of itself which he received on or about the 15th or 16th of December did not at that time constitute a cancellation of his insurance, because it says it is with regret we are to be relieved of liability as of a certain date, to wit, the [5] 27th day of December.

Now, the Defendant says that constitutes in and of itself a cancellation of the policy so that when the Plaintiff states in his application to Allstate on or about the 17th of December, which is approximately ten days before the date set for cancellation, that he has never had a policy cancelled, that he was making a false representation. That is the Defendant's position. I submit to Your Honor that is the issue of the case pure and simple.

The Plaintiff contends that that does not constitute a cancellation. He is not bound to tell the Defendant that my company informed me that they will cancel me ten days hence, or 12 days hence, because that is what the Defendant wanted, and the Defendant itself has prepared its very voluminous document, two page contract, very carefully——

The Court: I take it you are getting into the argument now.

Mr. Friedman: I am, but I am saying that as the position of the Plaintiff, that that does not con-

stitute a false representation when they, in answer to that, "I have not"—just the answer "No" to the question: "During the past two years, with respect to the named insured or to any member of his household, no insurer has cancelled or refused any automobile insurance, nor has any license or permit to drive an automobile been suspended, revoked, or refused." [6] And the Plaintiff has answered "No." The Defendant says because you made that answer we will not pay.

Now, in reference to damages. Of course, we are all familiar, in order to stay in this Court, the Plaintiff in its complaint must allege damages above \$3,000. The Court has jurisdiction, we submit here, in a conflict between citizens of two different states, and the claim, as alleged in the Complaint is for more than \$3,000.

At this point, however, I have received further information this morning in addition to those answers to interrogatories previously made to the Defendant, and I would like to add to the list of damages already set forth in the interrogatories an additional \$700 in damages. The answers to the interrogatories listed in great detail damages totaling \$3,568.82. Among them were \$476.27 for medicals. Now, the Plaintiff desires to add to those interrogatories the statement, add \$700 to the medicals for nurse's services performed by a Mrs. Michaelson, registered nurse. That would increase the total damages claimed, which is set forth in the interrogatories, to the figure of \$4,268.82.

The Plaintiff also claims complete loss of a 1951

Studebaker automobile which was overturned in a wreck while the car was being driven by Mrs. Erickson on the 15th of February. The policy provides for—it is contended, and I don't think there is any argument about that—for payment [7] of the loss sustained to the automobile. There may be an argument as to the car allegation, as to the value of the car. Now, in the Complaint it was alleged the value of the car to be \$2,000. After conferring with the Plaintiff and also in reference to his deposition and answers to interrogatories, he has stated that the value of the car at the time of the wreck, in his opinion, was \$2300. So I desire to amend the Complaint to set that forth.

It is contended in the answers to the interrogatories as \$2300, but in the Complaint it is set forth as \$2000, so at this point I would like to have the Complaint conform to those answers to the interrogatories and state the value of the car as of the time the Plaintiff had this accident to be, in his opinion, \$2300.

There is no other amendment that the Plaintiff desires to make, but merely to state that when this accident occurred on the 15th of February, Mrs. Birdella Erickson, who was driving it, drove the car, through accidental means, upon the highway, it overturned two or three times, she suffered severe personal injuries and required a great deal of hospitalization and medical care. In fact, she was hospitalized, I believe, at least 30 days, February 15, I have here, to March 25, Redwood Coast Hospital

bill for her of \$231.50, and I have a bill for Mr. Erickson of \$21.25.

The car turned over approximately three times up in [8] Mendocino County going around the turn. Mrs. Erickson received very serious injuries, required hospitalization, required the care of nurses, was compelled to come down to San Francisco to Stanford Clinic, and I have bills for that, and accorded treatment there. In fact, she didn't have sufficient funds to receive all the treatment she needed. If she had, probably her medical bills would have run much higher. Also she was attended by two nurses, one is already listed here, I have a bill from Mrs.——

The Court: Well, counsel, get to the evidence. This is just an opening statement.

Mr. Friedman: I beg your pardon. I just want to summarize there are bills and there is evidence that the amounts of damages, at least claimed by this Plaintiff, are \$4,268.82.

I don't know what the answer of the Defendant will be as to how they will try to get around it, they may try to get around part of it, but I submit the Plaintiff is within the jurisdiction of the Court on the allegations of the Complaint.

Secondly, that the issue is really simple here, that is, there is no false representation made to the Defendant by the Plaintiff when the Plaintiff in answer to the Defendant's statement in the application form in writing that there has been no previous cancellation says "No", and I believe that [9] there is a proper foundation for the Court here to order

and require this Defendant to pay on its policy of insurance for which a premium has been paid.

Mr. Walcom: If the Court please, may I respond briefly?

If the Court pleases, this is an action on the insurance policy of Allstate Insurance Company, which Mr. Erickson sought on the 17th day of December, 1952.

The evidence will show that on that day he appeared at the agency of Allstate Insurance Company and requested the issuance of a policy. At that particular time he completed an application for the policy and in that policy application he was asked a question, has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household.

Mr. Erickson answered "No."

The evidence will show that on the 15th day of December there had been mailed to him by his previous insurance carrier, the State Farm Mutual, the letter that counsel read to Your Honor, which said, we regret we are not going to carry you any longer, we are cancelling you effective the 27th of December. We are returning the unearned premium for the unexpired portion of the policy.

The evidence will show that upon receipt of that letter and upon receipt of his check returning the premium Mr. Erickson immediately went to Allstate Insurance Company [10] requesting coverage, and when he was asked the question about whether

he had been cancelled or any carrier refused to cover him further, he answered "No".

At the time that that application was issued, if the Court please, he was provided with binder coverage, that is, from the moment of the application he was granted insurance coverage. I may say that at the same time he told the agent that his policy with State Farm Insurance Company was expiring the next day, on December 18, and the evidence will show that on the application which then became a binder upon its acceptance and issuance there was provided a condition that any insurance bound hereunder shall otherwise be subject in all respects to the terms and conditions of the regular policy form of the company at present in use and to the statements in this application. If a policy is issued, it shall bear the effective date as provided on the face hereof.

Now, in due course, Mr. Erickson received this policy which, as counsel related, states that in reliance upon the declarations on the supplement page and subject to the limitation of liability, Allstate agrees.

Now, it agrees to cover the gentleman, provided, of course, that the representation that he made on his application and on that supplement page, it says: "During the past two years, with respect to the named insured, or to any member of his household, no insurer has cancelled or [11] refused any automobile insurance * * *". And in addition to that, on the policy there is a further provision: "Effect of policy acceptance: By acceptance of this policy

the named insured agrees that the declarations on the supplement page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents."

Now, the evidence will show, if the Court pleases, that at the time that Mr. Erickson made these representations that he had not been cancelled and not refused any further insurance, he had information --received that letter telling him his insurance was cancelled. It is true the effective date was on the 27th.

Then secondly, while Mrs. Erickson was driving the car that was involved in the collision, and that, of course, is a subject of the damage, the policy provided for collision insurance and also provided for medical payments coverage which counsel contends should be awarded here.

We, at the time of the filing of this suit, the evidence will show, made a **motion to dismiss** on the ground that there was no jurisdiction in this Court for this action. I may call your attention to that, I don't want to argue it, but we have denied jurisdiction. I call Your Honor's attention to the fact this law suit was filed many months, some eight or nine months after this accident occurred. At that time, in [12] a motion to dismiss, we stated that such time having elapsed the various bills were accumulated and could be set forth with particularity. Thereafter, that motion was denied and interrogatories were taken so that all along counsel has been aware of the effect in this law suit

of an inability to reach the \$3,000 jurisdiction involved. That is why we have denied that there is jurisdiction, and there is that issue.

We will, at the appropriate time, give Your Honor cases in the Federal Court and Federal Circuit governing this particular problem, one having to deal with the very company involved here, Allstate vs. Moldenhauer, 193 Fed. 2nd 66. That case involves not only the same Allstate Insurance Company, but the same warranty and the same State Farm Insurance Company, the same proviso on the part of the insurer.

The Court: What is the name of that?

Mr. Walcom: 193 Fed. 2nd 663, if the Court please.

The Court: 63?

Mr. Walcom: 663. Allstate Insurance Company vs. Moldenhauer.

The Court: All right.

Mr. Walcom: And I may say, if Your Honor pleases, that in the Moldenhauer case, when Mr. Moldenhauer applied to Allstate, just as did Mr. Erickson, he, at that time, had before him a notice from State Farm Mutual Insurance Company [13] that it was cancelling him as well.

Now, those are the issues. One is the jurisdictional amount, and second, the plain tenor of the letter Mr. Erickson received advising him that he was being cancelled.

The Court: All right.

Mr. Friedman: Your Honor, we may save some time if we can stipulate, Mr. Walcom, stipulate on the policy——

The Court: Swear the witness.

OSCAR F. ERICKSON

the Plaintiff, called on his own behalf, being first duly sworn, testified as follows:

The Court: State your name, please.

The Witness: Oscar Frederick Erickson.

Mr. Friedman: Mr. Walcom and I, Your Honor, have stipulated this is the policy Allstate issued on or about the 18th day of December, 1952, to the Plaintiff Oscar Erickson. I would like to offer it as an exhibit.

The Court: May be marked Plaintiff's Exhibit 1.

(The policy above referred to was received in evidence as Plaintiff's Exhibit 1.)

Mr. Friedman: And also Mr. Walcom is stipulating to admission into evidence of the letter of State Farm Insurance Company of the intention to cancel, dated the 15th day of December, 1952, and the covering letter dated September 15, 1954, in which this copy was sent to the Plaintiff by State [14] Farm Insurance Company. I would like to offer that as Plaintiff's Exhibit 2.

The Court: Exhibit 2.

(The letter of September 15, 1954 was received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Friedman: I would also like to offer as Exhibit 3 the application that Mr. Erickson executed—it is a carbon copy of it—at the time he applied for the insurance, and I think that should be in evidence, and I offer it as Exhibit 3.

The Court: May be admitted.

(Testimony of Oscar F. Erickson.)

(The application was marked for identification Plaintiff's Exhibit 3 and received in evidence.)

Mr. Friedman: And Mr. Walcom, you will stipulate that Defendant is a corporation duly incorporated and organized under the laws of the State of Illinois as a citizen of such state, principal office and place of business in Chicago.

Mr. Walcom: That is admitted in the answer, if the Court pleases.

Mr. Friedman: All right.

Direct Examination

Mr. Friedman: Q. Now, Mr. Erickson, you secured this [15] policy of insurance with the Defendant Allstate Insurance Company, did you not, on or about the 18th day of December, 1952; is that right? A. That's right.

Q. Now, at that time, Mr. Erickson, you had received a letter, had you not, which is Plaintiff's Exhibit 2, from your then insurer State Farm Insurance Company; is that correct, Mr. Erickson?

A. Yes.

Q. Have you looked at that letter this morning?

A. Yes, sir.

Q. Now, that letter speaks of an intention to forward you an unearned premium, I think, of \$11.35? A. That's right.

Q. Did you receive that in the mail at that time?

A. No, sir.

Q. When did you get that money?

(Testimony of Oscar F. Erickson.)

A. It was approximately about two or three weeks later when— about two or three weeks later.

Q. Now, how was it you didn't receive it, it wasn't contained in the letter? A. No, sir.

Q. At that time. Now, for what period was that money refunded? Was that for the period within before December 27 or after December 27? [16]

A. After.

Q. Then you still, as far as you knew, were insured with State Farm until the 27th day of December, 1952? A. That's right.

Q. But nevertheless you went down to Allstate the day you received this letter and applied for insurance with that company?

A. That's right.

Q. And you made the answers contained in Plaintiff's Exhibit 3 to the agent, is that right?

A. That is right.

Q. Who filled out that form?

A. The agent at Santa Rosa. I don't remember, I don't recall.

Q. This all occurred in the Santa Rosa store of Sears Roebuck, is that it?

A. That's right.

Q. You don't know the name of the agent, but an agent there filled it out?

A. That is right.

Q. And you signed it?

A. That is right.

Q. Now, Mr. Erickson, did you and your wife— well, put it this way: Was your wife driving your

(Testimony of Oscar F. Erickson.)

automobile on or about the 17th or 15th day of February, 1953? A. That is correct. [17]

Q. What is her name?

A. Birdella Erickson.

Q. Is she here in court? A. Yes.

Q. This lady here (indicating)?

A. Yes.

Q. Now, what occurred at that time and where did it occur?

Mr. Walcom: Counsel, I will stipulate there was an accident causing damage to the car and causing injury to Mrs. Erickson.

Mr. Friedman: Very well. Anything else you would like to stipulate to before I move on with the testimony?

Mr. Walcom: I don't think that is an issue, never denied she was ever in an accident.

Mr. Friedman: Mr. Erickson, what happened to your car at that time?

A. Well, my wife was driving the car and was going around the turn. She stepped on the accelerator and it stuck in passing gear and she couldn't control it and turned over three times.

Q. What was the condition of your car after this accident?

A. Well, the agent—not the agent, but the man from Santa Rosa, from Allstate, Corippo, he called at the hospital—I have never seen the person, never talked to him——

Q. You can't testify if you never saw him. [18]

(Testimony of Oscar F. Erickson.)

The Court: Were you in the automobile at the time?

The Witness: Yes, sir.

The Court: You were in the car at the time?

The Witness: Yes, sir.

The Court: All right.

Mr. Friedman: Q. Will you tell us, please, your observation of what condition the car was in?

A. Well, the car was completely wrecked.

Q. All right. Now, what do you estimate the value of this car to be as of that date?

A. To my estimation, the car at that time—it was paid for and everything—was worth \$2300 to me, and I had taken it to Lou Fox before we went to Mexico.

The Court: We are trying to get along with a fan, and yet at the same time I think we better turn the fan off.

Mr. Friedman: Q. Take your time, please. I didn't get that answer. May I have it read?

(Record read by the reporter.)

The Witness: That's right.

Mr. Friedman: Q. Now, what kind of a car was that, Mr. Erickson?

A. It was a Studebaker, 1951.

Q. What model? A. 1951.

The Court: What particular model? [19]

The Witness: Oh, it was a Regal Deluxe.

The Court: Regal?

The Witness: Commander.

The Court: A sedan?

(Testimony of Oscar F. Erickson.)

The Witness: Yes, Commander.

Mr. Friedman: Q. As a matter of fact, Mr. Erickson, is this document I hold in my hand, which I am about to show you, a copy of your purchase order of this car when you bought it, and does it represent the price you paid for the car?

A. That's right.

Q. Look at it, please? A. Yes, sir.

Q. And the price indicated is a total of \$2,-794.71, is that correct, Mr. Erickson?

A. That is right.

Q. Purchased on March 23, 1951?

A. That's right.

Q. Was that purchased new?

A. Yes, sir.

Mr. Friedman: I would like to offer this in evidence, Your Honor, as proof or corroboration of proof of the value of the car.

The Court: All right. May be marked Exhibit 4.

(The purchase order was marked and received [20] in evidence as Plaintiff's Exhibit 4.)

Mr. Friedman: Now, were you injured or your wife injured in this accident?

A. We both were.

Q. Now, what happened to you, what happened to your wife? A. My wife—

Mr. Walcom: Just a moment. I object to this as calling for the conclusion of the witness, if the Court please. That should be subject of medical testimony.

(Testimony of Oscar F. Erickson.)

The Court: I don't think it yet calls for a conclusion; she went to a hospital.

Mr. Walcom: Very well, I will withdraw the objection.

Mr. Friedman: Q. What happened, Mr. Erickson, if you can tell us?

A. Well, she had several concussions of the brain.

The Court: Was she taken to a hospital?

The Witness: Yes, sir.

The Court: Where?

The Witness: At Ft. Bragg, California.

The Court: That was immediately after the accident, was it?

The Witness: That's right.

The Court: And how long did she remain in that hospital?

The Witness: Fifteen days.

Mr. Friedman: Q. Mr. Erickson, have you ever received [21] a bill from the hospital?

A. Yes, sir.

Q. Both for yourself and your wife?

A. Yes, sir.

Q. Did you go to the hospital, too?

A. Yes, sir.

The Court: Was there anyone else in the car but you and Mrs. Erickson?

The Witness: No, sir.

Mr. Friedman: Q. Are these the bills, Mr. Erickson, you received from the hospital?

A. Yes, sir.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: I would like to offer these in evidence, Your Honor.

The Court: May be marked Exhibit 5.

(Hospital bills marked Plaintiff's Exhibit No. 5 and received in evidence.)

Mr. Friedman: Q. Did you wife secure any additional medical treatment, other than this hospitalization after this accident?

A. Yes, sir.

Q. Where and what?

A. Stanford-Lane Hospital, San Francisco.

Q. Do you know what was done for her there?

A. Well, it was taking care of the injury on her forehead. [22]

Q. Did you receive any further medical care?

A. No, sir.

Q. Mr. Erickson, can you tell us what happened to your car in reference to the Defendant Allstate and its conduct of this matter immediately after the accident?

A. Well, the car was towed in to the garage at Burke's Motor Company and in Ft. Bragg, and it was there for about four or five days, and then I went down to see it and it was gone. I never have any recollection of the car being moved.

Q. Anyone tell you they were moving it from there?

A. Nobody told me anything.

Q. Did you find out where it was taken?

A. Yes, I talked to Mr. Burke at the Ford Motor Company and he told me——

(Testimony of Oscar F. Erickson.)

Q. Speak into the microphone.

A. Repeat that over?

Q. Yes, please.

A. Mr. Burke at the Ford Motor Company told me at that time that it was taken to Ansel Schloss in San Francisco.

Q. You hadn't ordered that done?

A. I had never, no.

Q. Did you subsequent to that call the Ansel Schloss, call Ansel Schloss and ask him what he was doing with the car? A. Yes, sir.

Q. About how long after that was it? [23]

A. About a week.

Q. Can you tell us the conversation?

Mr. Walcom: Just a moment.

Mr. Friedman: Withdraw it.

Q. Did you ever get your car back?

A. No, sir.

Q. Were you told at that time that the Allstate wasn't going to take care of paying the medical bills and property damage and so on?

Mr. Walcom: Just a moment. If the Court please, I will object to that, calling for hearsay unless he was told by some of the Defendants.

The Court: Objection sustained.

Mr. Friedman: Q. Did any representative of Allstate Insurance Company at that time advise you in any way that you were not—I am speaking immediately after the accident—that you were not to be, that your policy wasn't to be honored?

A. Not right at that time, no, sir.

(Testimony of Oscar F. Erickson.)

Q. As a matter of fact, all the information was to the contrary? A. That's right.

Mr. Walcom: Now, just a moment.

Mr. Friedman: All right.

Q. Mr. Erickson, I am showing you a letter dated March 3, [24] 1953 on the stationery of the Allstate Insurance Company, and ask you whether you received this letter? A. Yes, sir.

Q. Did you receive this letter?

A. Yes, sir.

Mr. Friedman: I offer this letter in evidence, Your Honor, as indicative of the state of mind of the Defendant at that time.

Mr. Walcom: I will object to it as indicating the frame of mind of the Defendant. In any event, the letter speaks for itself.

Mr. Friedman: Anyway, the Court wants to look at it.

The Court: Give it 6.

(The letter dated March 3, 1953, was marked Plaintiff's Exhibit 6 and received in evidence.)

Mr. Friedman: Q. Now, Mr. Erickson, I am going to show you a letter dated March 4, 1953, from Allstate Insurance Company, and a letter dated March 24, 1953, Allstate Insurance Company——

Mr. Friedman: Have you an erasure, please? I just want to remove some pencil marking on the letter——

Mr. Friedman: Q. (Continuing) ——and I will

(Testimony of Oscar F. Erickson.)

ask you whether you received those letters from the Allstate Insurance Company?

Mr. Walcom: I will stipulate he did, counsel.

Mr. Friedman: Let him look at them, anyway.

The Witness: Yes, sir.

Mr. Friedman: Counsel has also stipulated. I offer these exhibits as Plaintiff's exhibits next in order, Your Honor.

The Court: Let the March 4 letter be marked Exhibit 7, and the letter dated March 24 as Exhibit 8.

(The letters dated March 4, 1953 and March 24, 1953, were marked Plaintiff's Exhibits Nos. 7 and 8 respectively and received in evidence.)

Mr. Friedman: Q. And then, Mr. Erickson, I will show you a letter dated April 13, 1953 on the stationery of Allstate Insurance Company together with an attached copy of a letter previously sent to you, and will ask you whether you received that letter together with the attached copy on or about the 14th or 15th of April, 1953?

Mr. Walcom: May I see that, counsel? This is addressed to you.

Mr. Friedman: Oh, I beg your pardon; I beg your pardon. I think we already have the 24th letter in there.

Mr. Friedman: Q. Mr. Erickson, on or about the 25th or 26th of March, 1953, was the first indication, was it not, that the Defendant, Allstate, was not going, would not honor their policy? [26]

A. That's right.

(Testimony of Oscar F. Erickson.)

Q. You hadn't received previous information to that effect before? A. That's right.

Q. That is approximately—well, the Court can compute that, approximately 19 days after the accident? A. That's right.

Q. Now, Mr. Erickson, did you receive the document I am about to show you, registered mail, from Ansel Schloss on or about the 12th day of December, 1953? A. Yes, sir.

Mr. Friedman: I offer this document in evidence, Your Honor, as the exhibit next in order.

Mr. Walcom: I think it is wholly incompetent, irrelevant and immaterial, if the Court pleases.

The Court: Is it a letter?

Mr. Walcom: It is notice of sale of car for non-payment of the repair bill.

Mr. Friedman: It is notice of intention to sell the automobile owned by Mr. Erickson by Ansel Schloss for non-payment of repair bill, and I feel it is material in this case because his testimony will show that apparently the car was sold and that would involve a total loss of his car plus a deficiency on his bill for non-payment, and for that reason it is being offered to show damage suffered by Mr. Erickson [27] as the result of Allstate's failure and refusal to honor their contract.

Mr. Walcom: If the Court please, there would be no probative value in a legal notice. I am sure that Plaintiff could bring in someone from Ansel Schloss to show whether or not there is any de-

(Testimony of Oscar F. Erickson.)

ficiency or what the bill was. It is only a notice or copy of a publication in the recorder.

Mr. Friedman: It speaks for itself.

The Court: It is notice of sale?

Mr. Friedman: Intention to sell, Your Honor.

The Court: Intention.

Mr. Friedman: For an unpaid repaid bill of \$1117, and they say that they will sell the automobile, Wednesday, 6 January 1954, at 12:00 a.m. at 49 South Van Ness Avenue in the City and County of San Francisco, State of California, to satisfy a lien against said automobile in the sum of \$1,117.55.

I think that is very material.

Mr. Walcom: It is of no probative value, no sale, those are all matters of proof. It is harmless in itself, but of no probative value as to value or anything else, if the Court please.

The Court: I am inclined to think the objection to it should be sustained, particularly a notice of sale. I will mark it for identification, however: give it 9 for identification. [28]

(Notice of intent to sell was marked Plaintiff's Exhibit 9 for identification.)

Mr. Friedman: Q. Mr. Erickson, did you ever receive any other notice of any other kind from Mr. Schloss? A. No, sir.

Q. Never heard from him again, did you?

A. No, sir.

The Court: Did you go down there?

The Witness: No, sir.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Q. This was subsequent, was it not, to the declination of the Defendant to honor the policy? This came later, did it not?

A. Yes, sir, that is right.

Q. This notice, many months later?

A. That's right.

Q. And your car had been taken down to Ansel Schloss without——

A. That's right.

Q. ——without your authorization?

A. That is right.

Q. By a representative of Allstate?

A. That's right.

Q. The car had been towed to a Ft. Bragg garage?

A. Yes, sir. [29]

Q. As far as you knew or were concerned, is that right?

A. That's right.

Q. The next you knew, it was taken down to Ansel Schloss?

A. That is correct.

Q. The next thing you heard about it as far as its ultimate disposition was they were going to sell it for these repairs?

A. That's right.

Q. As a matter of fact, your information was the car wasn't repairable, was that true?

A. That's true.

Mr. Walcom: Just a moment. I will object to what his information was. Hearsay.

Mr. Friedman: Withdraw it.

Q. The car, when you saw it, was a total wreck, is that right?

A. That's correct.

Q. Do you know if that car was sold by Ansel Schloss?

A. Sir?

(Testimony of Oscar F. Erickson.)

Q. Do you know if the car was sold by Ansel Schloss? A. As far as I know, yes.

Q. Do you know what price they got for it?

A. I think it was around \$600 and something.

Q. Now, Mr. Erickson, when you took this car, or rather, you took the insurance from Allstate on or about the 17th of December, 1952, was there any conversation between you [30] and the agent with reference to the use of a car in the event of a wreck? A. Yes, sir.

Q. What was that conversation?

A. At the time, he told me that if I had a wreck and I couldn't use my own car that I had, that I could have a car or borrow a car, that they would furnish me transportation.

Q. Now, after this wreck, did you request from any agent or representative of Allstate the use of a car?

A. I called the Allstate agent at Santa Rosa and he said definitely no.

Q. Then what did you do with reference to the use of a car?

A. I had to call my nephew at Booneville, which was 48 miles, to come and get me.

Q. Where were you at that time?

A. In Ft. Bragg.

Q. And then did you use his car or any car as the result of this accident?

A. I used his car.

Mr. Walcom: Just a moment. I am going to make an objection to that line of testimony, if the Court

(Testimony of Oscar F. Erickson.)

please. There is no provision whatever in this policy for any loan of a car or car rental under collision, and I don't think there is in any policy. [31]

The Court: Is that in the policy?

Mr. Walcom: No, Your Honor.

Mr. Friedman: Your Honor, I would say that Mr. Walcom may have a point there. It would be a matter of interpretation. There are a couple of spots in the policy that might be elastic enough. They wrote the policy.

Mr. Walcom: Here is a copy. Would you show us any place where there is any place about car rental?

Mr. Friedman: Now, on page 1—it may not apply—I am saying it could be elastic enough; under 5 it says:

“Coverage J—towing and labor insurance. To pay costs for labor done at the place of disablement and for towing, made necessary by the disablement of the owned automobile or a substitute automobile.”

That might be interpreted, if he were driving a substitute automobile, this man could believe that he was entitled to a substitute automobile.

Then, on page 2 where it says “Definitions”, under Definition 10, where it says:

“‘Loss’, wherever used with respect to coverages D and H means each direct and accidental loss of or damage to the automobile.”

Coverage D, I think, is the collision and H is comprehensive; it may be in reverse, but it is those phrases. [32]

(Testimony of Oscar F. Erickson.)

Now, of course, there is a loss of his automobile, I will admit that. We are expanding, possibly, but it isn't beyond the realm of interpretation and we did have the rule that since the Defendant Allstate Insurance Company has written this policy that if there is any ambiguity in it or in its interpretation that it would be just and equitable that it be interpreted against them.

Now, I have an item of damage listed in the answers that loss of use of car for 30 days. Now, I also understand that one of the arguments by Defendants, they are contending in the limits of liability on page 4 in the last paragraph where it says the limit for liability is the actual cash value of the automobile, or if the loss is of a part,—I understand they are relying on that.

I say, if we apply the rule of interpretation and take the phrase on page 1 and the damage total and labor and take the definition of loss, I would say it would not be beyond the realm of fair interpretation to interpret this policy to mean that if he suffers an accidental loss, the loss of or damage to the automobile, that he is entitled to recover for that loss.

Now, the testimony here attempted to be elicited is the loss of use of this car as a result of the accident. I say that this subdivision 10 does not by its definition completely exonerate this company if this man is able to [33] prove to the Court that he has a right to claim under the policy nor, as I say, maybe that right or very possibly that right should

(Testimony of Oscar F. Erickson.)

extend to the accidental loss of use, because it is accidental loss of his car.

Mr. Walcom: If the Court please, I am rather bewildered by counsel's exposition of what this policy is, but it is very plain. Coverage J, you will see, is the towing and labor, to pay cost for labor done at the place of disablement and for towing made necessary by the disablement of the owned automobile or a substitute automobile. But there is no substitute automobile involved here. It is very readily defined on page 2 what is a substitute automobile. It says an auto not owned by the insured, but temporarily used as a substitute when his own automobile is laid up or something. That doesn't come into the picture at all, and the loss referred to in Coverage D means accidental loss or damage to the car. There is no evidence whatsoever, any verbiage any place in this policy where the company will pay him for a car, loan him a car, nor can counsel find any insurance policy that says that as far as collision is concerned. Any rental permitted is where you have a theft case, and that is described in paragraph 9 of the policy. There isn't anything in this policy that would provide for loss of use that counsel is asking under the policy. Just nothing whatsoever in there that covers that issue.

Can I assist Your Honor in any way? I think it is so clear.

Mr. Friedman: It may be clear to Allstate, but it may not be clear to the purchaser of the insurance, and if Allstate has carefully devised this con-

(Testimony of Oscar F. Erickson.)

tract and it is subject to an interpretation, I submit they are bound by any ambiguity that they themselves have created in the writing.

The Court: What is called Coverage B, Mr. Walcom?

Mr. Walcom: Coverage B, Your Honor, is property damage. In other words, Coverage A is liability or bodily injury, to pay for personal injuries or death or the like.

B is for injury to or destruction of property, as Your Honor will see in the insuring agreement, No. 1.

Now, that, of course, is for third parties. In other words, this is an indemnity, that provision is an indemnity that protects the Defendant against the claims of someone else for injury to his person or to his property.

Mr. Friedman: Now, the only coverage we are concerned with here, if I may assist Your Honor, is what we call first party coverage.

Mr. Walcom: That is to say, that covers just medical payments.

The Court: I call your attention to subdivision 6 of 10, where the words "loss of use" is used, you contend that [35] refers to property damage?

Mr. Walcom: Yes, Your Honor, covers whenever used with respect to coverage A, that is personal injury, bodily injury liability, includes coverage for care and loss of services and with regard to Coverage B, damages for loss of use.

The Court: If somebody else——

(Testimony of Oscar F. Erickson.)

Mr. Walcom: For someone else, it will indemnify. That is third party coverage, but there is no provision that follows One having his own personal property damaged and being laid up.

The Court: I do not see anything in there, counsel, as yet, which would cover the loss of use by the Plaintiff here.

Mr. Friedman: Well, Your Honor, I have submitted the argument about interpretation. I realize that the policy has to be interpreted to place that construction on it, and the argument is based upon the fact and basis that they have created some ambiguity and are responsible for the ambiguity.

The Court: Well, I think that is the general principle that the policy must be construed most strongly against the insurance company, but I still don't think it goes so far as to cover any loss of use.

Mr. Friedman: Very well, Your Honor. I have an exception on the record. [36]

Mr. Friedman: Q. Mr. Erickson, what were the total amount of bills, including this morning's amendment of \$700 for nurses, for medicals, such as drugs and so on?

Mr. Walcom: Just a moment, I will object to that. I haven't seen any proof of any bills other than those presented here.

Mr. Friedman: All right.

Now, Your Honor, in reference to bills, I make the statement now we can present bills for all the damages. I am going to have to rely for some of

(Testimony of Oscar F. Erickson.)

them on the testimony of the parties involved, and I believe that is admissible evidence.

The Court: Well, let's go as far as we can with what you have.

Mr. Walcom: I will stipulate to that.

Mr. Friedman: What is the amount?

Mr. Walcom: \$72.50 is what I got.

Mr. Friedman: I believe I had \$82.87, whatever bill counsel stipulated to——

Mr. Walcom: \$72.50, that is my——

The Court: Well, let's take a recess and you can add them up. (Short recess.)

Mr. Friedman: Your Honor, counsel was right. There is a discrepancy of about \$7, and our bills total \$74.97, is [37] that right?

Mr. Walcom: Yes.

Mr. Friedman: I would like to submit these additional bills.

The Court: These are bills. May I see them? They are for what?

Mr. Friedman: These bills, Your Honor, are for clinical treatment at Stanford, for some drugs up there, and miscellaneous items of care.

The Court: That is for treatment and for drugs down here, and also up in the other——

Mr. Friedman: I believe all down here.

The Court: All down here. All right. They total what?

Mr. Friedman: They total \$74.97.

The Court: That is for the treatment of Mrs. Erickson?

(Testimony of Oscar F. Erickson.)

Mr. Friedman: For the treatment of Mrs. Erickson.

The Court: They may be marked as one exhibit, Exhibit 10.

(The bills above referred to were marked Plaintiff's Exhibit No. 10 in evidence.)

Mr. Friedman: Q. Mr. Erickson, how was your wife removed from the scene of the accident?

A. By a car.

Q. Whose car?

A. Friend by the name of John Hansen. He lives in Albion. [38]

Q. Where was she taken?

A. To the Redwood Coast Hospital.

Q. Now, in answer to interrogatory No. 15, cost of removal from scene of accident to Redwood Coast Hospital for Birdella Erickson, \$15. What was that for?

A. To pay the man to take us over there.

Q. Was that actually paid?

A. Yes, sir, I paid that to this man.

Mr. Walcom: What is that name again?

The Witness: John Hansen.

The Court: \$15?

The Witness: Yes, sir.

Mr. Friedman: Yes, Your Honor.

I have no other questions of this man at this time, Your Honor.

Cross Examination

Mr. Walcom: Q. Mr. Erickson, do you have the policy with the State Farm Insurance Company

(Testimony of Oscar F. Erickson.)

that was in force prior to the time that you went to Santa Rosa and requested coverage with Allstate Insurance Company? A. Yes, sir.

Q. May I see it, please?

Mr. Friedman: I don't know whether this is the one. It may be the previous one, but I think they are probably about the same, probably be a renewal of the same policy. [39]

Mr. Walcom: We will pass it. We will present a policy subsequently.

Mr. Walcom: Q. Mr. Erickson, in any event there came a time in December of 1951 when you received that letter which has been marked as your exhibit——

Mr. Friedman: 1952.

Mr. Walcom: I am sorry, 1952.

Q. (Continuing): ——from the State Farm advising you that they regretted their inability to continue covering you, cancelling you effective the 27th of December, 1952, did you not?

A. That's right.

Q. Now, calling your attention to your previous experience with the State Farm, you had had about eight losses on your car immediately prior to that particular date, had you not?

Mr. Friedman: Your Honor, I am going to object to any questioning along that line. The action is based upon a policy of insurance, the declination to pay is based upon an answer to a written representation contained in the body of the application and again in the policy that is issued, and I submit

(Testimony of Oscar F. Erickson.)

that no parol evidence can be used here to vary the terms of this policy, and that if we wander into other fields this trial would be prolonged days, and I don't think counsel should be permitted to examine into anything but the question of whether or not his answer of "No" [40] constituted a breach of the representation contained in that policy.

The Court: Counsel, does it really make any difference whether the prior company, the State Farm, was or was not correct in its position that they were going to cancel, or the reasons?

Mr. Friedman: No.

Mr. Walcom: My only position is more or less preliminary. I merely want to show at the time this gentleman went to Allstate he knew he was being cancelled and the reasons for it.

Mr. Friedman: The only point, Your Honor, is there a breach of any representation and the representation is, have you ever been cancelled, and that is the issue.

The Court: Well, I think if it is just merely a preliminary question to show that he knows that there is a reason for that, I will permit that answer for that purpose.

Mr. Walcom: Q. You had had about eight losses from 1948 to 1952, had you not, collision losses, to your car? A. Not that many.

Q. You had several, in any event, did you not?

A. Well, personally I never had any, but I am the father, so I will take the blame.

Q. Let us take the last one immediately prior to

(Testimony of Oscar F. Erickson.)

the cancellation letter, that was when an intoxicated person was [41] driving your car, isn't that true? A. That's right.

Q. And then came that letter advising you they were no longer going to carry you, isn't that true?

A. That is right.

Q. And that letter is dated December 15 of 1952?

A. Yes.

Q. You received that the following day, Mr. Erickson?

A. Will you repeat that question?

Q. Could you tell us on what day you received that letter of State Farm advising you that they were going to cancel you? On what date did you receive it?

A. I think on the 15th or 17th, or in between that.

Q. In any event, immediately upon the receipt of that letter, you then went down to Santa Rosa to Allstate Insurance Company?

A. That is correct.

Q. Yes. And it is true, is it not, that you were asked first of all whether or not any insurance company had cancelled you within two years preceding your application and/or whether any insurance company had refused you coverage; you were asked that question? A. That's right.

Q. And at that time you said "No", didn't you?

A. That's right. [42]

Q. And you received that document, which is in evidence, that is, that application which bears upon

(Testimony of Oscar F. Erickson.)

the reverse of it the binder provisions, did you not? You received a copy of that application which you signed on the reverse of it, the provisions there, No. 5 particularly, relating to the terms and conditions of coverage, did you not? A. That's right.

Q. Yes. And all the time that you talked with the agent, Mr. Erickson, you knew in your mind that you had received a letter from the State Farm telling you that they refused to give you coverage and that they were cancelling you effective December 27, didn't you?

Mr. Friedman: Your Honor, I am going to object to that question. The letter is in evidence; the letter speaks for itself. The policy is in writing. I think all of this is very far afield. The company has prepared its representations, the exact language of the representation itself, has control of the document, has submitted it to this man, he has accepted it, and in respect to a particular question that the company, if the company had wanted to say, have you received a letter, put it in there, in which you will be cancelled, it could protect itself. The query is have you ever been cancelled, and I believe cancellation, as Your Honor probably knows, is not a——

The Court: You are arguing something? [43]

Mr. Friedman: I object to the question.

Mr. Walcom: Your Honor, at an appropriate time we will be introducing some sections of the insurance code of this state and I want to get the facts to conform to it.

(Testimony of Oscar F. Erickson.)

The Court: Mr. Erickson, did you receive any other communication of any kind from the State Farm in reference to cancellation, other than this letter dated December 15?

The Witness: No, sir.

The Court: No oral communications or written communications other than this?

The Witness: That is right.

The Court: This December 15 letter, I think that speaks for itself.

Mr. Walcom: Q. Then let me ask you this, Mr. Erickson: When you got that letter you went to see Mr. Higgins, the State Farm agent, did you not?

A. I am sorry, I did not.

Q. Yes, and when you saw Mr. Higgins he told you you were being cancelled because——

The Court: He said he did not, Mr. Walcom.

The Witness: I am sorry.

Mr. Walcom: I am sorry, sir.

At this time, if the Court please, I would like to ask [44] leave to file the deposition of the plaintiff, Mr. Erickson, and ask that it be marked and like to refer to it, if the Court pleases.

Mr. Friedman: Your Honor, I don't know what section of the deposition counsel is going to refer to, but if he is going to refer to any conversation by and between Mr. Higgins and Mr. Erickson, I submit it is inadmissible under the issues of this case, regardless of what that conversation was.

The Court: Well, the deposition of a party is always admissible, counsel.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Yes, but subject to my objection.

The Court: Some particular objection to a conversation, we can handle that. It may be marked.

Mr. Walcom: Q. Now, you did talk to him on the telephone, that is, Mr. Higgins?

Mr. Friedman: Your Honor, I am going to object to any questions with reference to conversations between Mr. Erickson and Mr. Higgins. The policy is there, the letter is there, and that is the issue of the case.

Mr. Walcom: If the Court please, this is cross examination, if for no other purpose it would certainly be admissible as impeachment, because we have the man's deposition and there relates his telephone conversation with Mr. Higgins. That is what I want to examine him about right [45] now.

The Court: As to what, Mr. Walcom? When is this conversation?

Mr. Walcom: This conversation, on or about the 15th day of December, 1952, with Mr. Higgins, he telephoned him——

The Court: Who is Mr. Higgins?

Mr. Walcom: He was the State Farm agent.

The Court: Would he have any authority to take any action on his policy?

Mr. Walcom: Other than to return the premium, which that letter indicates, the premium check was forwarded to his agent.

The Court: You contend that the premium check did accompany the letter of December 15?

Mr. Walcom: Oh, no. The letter says, says we

(Testimony of Oscar F. Erickson.)

are returning the premium check through your agent, Mr. Higgins.

Mr. Friedman: I don't recall——

Mr. Walcom: Well, your agent——

Mr. Friedman: Doesn't say Higgins.

The Witness: No.

The Court: Forwarded to our representative for disposition.

Mr. Walcom: Yes.

Mr. Friedman: Could have been anybody.

The Court: You contend the premium had been returned prior to the 17th? [46]

Mr. Walcom: Your Honor, I don't think it makes any—I am not concerned when the premium was returned.

The Court: Why go into that?

Mr. Walcom: Only going into that to show Mr. Erickson talked with Mr. Higgins and was informed because of his bad accident record he would be cancelled.

Mr. Friedman: Your Honor, I don't think that is proper because it opens the door to many things, conversations, other conversations, possibly between Mr. Higgins and Mr. Erickson, whether Mr. Higgins is authorized to tell Mr. Erickson why the company is doing it, whether he knew himself, and so on. I don't think that is proper.

Mr. Walcom: Only from the lips of Mr. Erickson himself. He admits in his deposition he was told by his agent, Mr. Higgins, that it was on account of the wrecks.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Your Honor, that is on deposition. We are on trial here now, and I wasn't even present. In fact, an associate of mine was there. I would have objected if I were, and I have a right to object now.

The Court: Well, frame your question, counsel, and you can make the objection.

Mr. Walcom: Q. Mr. Erickson, can you tell me whether or not on the 15th day of December, 1952, you called Mr. Higgins?

Mr. Friedman: I object again. [47]

The Court: That is preliminary. The objection to that may be overruled.

A. I did not. Any statement in there regarding that, that is not true, because my wife went to the Eastern Star that night and talked to Mr. Higgins herself.

Mr. Walcom: Q. All right, let me call your attention to your deposition on page 26, line 8.

Mr. Friedman: Your Honor, the witness has indicated additions, if he made such a statement, to correct it at this time.

Mr. Walcom: Q. Page 26 and continuing on to 27——

Mr. Friedman: The whole page?

Mr. Walcom: Starting at line 8.

Mr. Friedman: Well, it is the same objection, of course, goes into the conversation with Higgins, whether Higgins has authority, and heavens knows.

The Court: That is another matter, whether he had authority.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: Only concerned with his knowledge.

The Court: Yes.

Mr. Walcom: Q. I will ask you, do you recall, Mr. Erickson, that on the 13th of September, 1954, your deposition was taken in my office, you were then accompanied by Mr. Tashjian, your counsel's associate? A. Right. [48]

Q. I will ask you whether or not these questions were asked you and whether you gave these answers.

First, read it to yourself, and then I will ask you the question.

Mr. Friedman: Now, Your Honor, I gather——

The Court: He has a right to ask the question, counsel. Get the question in the record.

Mr. Friedman: But I gather he is trying to impeach his testimony that he had a conversation.

The Court: That's right.

Mr. Friedman: Now, that's the first question.

Mr. Walcom: Q. Will you please read, Mr. Erickson, from line 8 on page 26 down to line 17 on page 27? Just read that to yourself, sir.

(Witness reading.)

Mr. Walcom: Thank you, sir.

Q. Now, Mr. Erickson, on the 13th of September when your deposition was taken, will you please tell us whether these questions were propounded to you and these answers given:

“Q. Now, when you got that letter from State Farm, which was dated on or about the 15th day

(Testimony of Oscar F. Erickson.)

of December of 1952, Mr. Erickson, did you then go to Mr. Higgins?

"A. No, we called him.

"Q. You called him. And at that time did [49] he not tell you that State Farm would not insure you further? "A. No, he did not.

"Q. Did he tell you to go place your coverage with some other company? "A. Yes, sir.

"Q. And then you did? "A. Yes, sir.

"Q. And when he told you to place it with some other company, did he tell you anything at all about why State Farm had written you that letter?

"A. Well, on account of the wrecks I had.

"Q. Yes?

"A. Not me, but I had the wrecks.

"Q. Yes. Did he say that the company because of those several collisions, and particularly the one where the car was loaned to some friend of yours who had become intoxicated, was the reason the company couldn't continue carrying you, is that what he told you, sir?

"A. No, he never said that.

"Q. Did he mention those at all? [50]

"A. No, sir.

"Q. But he said because of some claims, the company didn't want to cover it anymore, isn't that correct?

"A. Well, he said it was just a hazard to them to carry me along because of the many wrecks I had had.

(Testimony of Oscar F. Erickson.)

“Q. And did he tell you therefore they were refusing to carry you further as an insured?”

“A. No, sir. He told me that if I wanted to have a hearing that I could after December, when the policy was cancelled.

“Q. Yes. But did he tell you that on account of this loss record or this number of hazards, that the company was cancelling, is that correct?”

“A. Yes.”

Now, were those questions asked of you and those answers given by you? A. Well——

Q. Answer that yes or no, sir.

A. Well, I never talked to Higgins——

The Court: Did he give those answers?

The Witness: I gave them answers, but I was referring [51] to my wife talking, that is how I gave them answers.

Mr. Walcom: Q. Mr. Erickson, passing for a moment to the time of that application with Allstate, you were not solicited by Allstate, but you went there on your own account to secure coverage, is that right?

A. I called them up and made an appointment.

Q. Yes. I will ask you whether or not it isn't a fact that you told the agent of Allstate that your policy with State Farm was expiring on the next morning? A. No, sir.

Q. You have seen that document which is the application—I wonder if Your Honor would permit me to look at the one that is in your hand.

I will show you the Plaintiff's Exhibit No. 3, Mr.

(Testimony of Oscar F. Erickson.)

Erickson, and—I beg your pardon, let's withdraw that question for the moment; put it in this fashion:

In addition to the information which is contained on the face of Plaintiff's Exhibit No. 3, Mr. Erickson, you were asked other information which was written on the reverse of that?

A. May I see it?

Q. Let me show you.

Mr. Friedman: May I see it, please, Mr. Walcom?

Mr. Walcom: Yes, the questionnaire.

Q. Let me ask you, first of all, Mr. Erickson, did you tell [52] the agent there that you were Swedish? A. No, I told him I was American.

Q. All right. Did you tell him you had been driving a car—a car for 40 years?

A. I probably did.

Q. Did you tell him you were a married man?

A. Yes, sir.

Q. Without any physical impairment?

A. That's right.

Q. And did you tell him you had one child?

A. That's right.

Q. 21 year old son? A. Yes, sir.

Q. Who was then in service?

A. Yes, sir.

Q. And that you were employed. You were then residing at, rather, you had lived at 414 Main Street, Ft. Bragg? A. Yes, sir.

Q. For 30 years? A. Yes, sir.

(Testimony of Oscar F. Erickson.)

Q. You had been employed at the Union Lumber Company in Ft. Bragg for 21 years?

A. That's right.

Q. Saw filer, occupation? A. Yes, sir. [53]

Q. Employed by the Independent Redwood Lumber Company? A. That's right.

Q. Had been so employed for a year and a half?

A. That's right.

Q. And your employer was in Booneville, California? A. Right.

Q. Did you also tell him your wife's name was Birdella? A. That is right.

Q. Aged 44? A. That's right.

Q. And she was a housewife? A. Right.

Q. And that she used the car about ten per cent of the time? A. That's right.

Q. Had no impairment of driving ability?

A. What is that?

Q. That she had no impairment of ability to drive?

A. Been driving a car quite some time.

Q. Did you tell him 20 years, did you?

A. That is what I said.

Q. And resided at the same address?

A. That's right.

Q. Did you tell him you had never had any accident or loss to your car? [54]

A. That's right.

Q. And in fact there had been some accidents to your car, though?

A. Oh, sure, but I never had any.

(Testimony of Oscar F. Erickson.)

Q. All right. And you gave him your driver's license number, didn't you?

A. That's right.

Q. And then you told him you had been insured with the State Farm Insurance Company?

A. That's right.

Q. Policy No. 528848-134-05, didn't you?

A. I suppose I did.

Q. Did you tell him that the expiration date of that policy was December 18?

A. No, sir. If it is in there, that is put in by somebody else.

Q. You told him that neither you nor any relative had previously been insured by Allstate, is that correct?

A. No, sir, not that I know of.

Q. And had no other automobile in the household?

A. No, sir.

Q. So that all that information which you related, the only thing which you say was not related by you is that the policy with State Farm expired on December 18?

A. I never said that. [55]

Mr. Friedman: And the fact that he was American, not Swedish.

Mr. Walcom: That is correct. We will put this in subsequently as an exhibit, merely wanted to interrogate the witness on it at this time.

Q. Now, Mr. Erickson, passing for a moment from your application, you, in due course, received your policy from Allstate Insurance Company, did you not?

A. Not right away, no.

(Testimony of Oscar F. Erickson.)

Q. But you did get it in due course?

A. That's right.

Q. And came the time when this accident occurred in February, whereupon your car was damaged, is that correct?

A. Right.

Q. Now, your car was removed from Ft. Bragg down to San Francisco at no expense to you, is that true?

A. That's true.

Q. And before that car was ever repaired by Ansel Schloss here in San Francisco you made a phone call to Ansel Schloss, didn't you?

A. I called them, yes.

Q. Yes. And do you recall with whom you spoke at the time you called?

A. No, I don't.

Q. Could you tell us, if you know, on what date you made [56] that call?

A. No, I don't.

Q. It is true, isn't it, Mr. Erickson, that when you made that call you told Ansel Schloss you wanted that car painted a different color than it had been?

A. They said they were going to repair it.

Q. I asked you whether you told Ansel Schloss to paint it a different color?

A. Yes, when he said he was going to repair it, and I told them if they were going to do that, to paint it black.

Q. It had been maroon and you wanted it black?

A. Correct.

Q. As a matter of fact, the gentleman with whom you talked asked you for authorization to repair the car, didn't he?

A. No, sir.

(Testimony of Oscar F. Erickson.)

Q. He didn't? A. No, sir.

Q. Can you tell us what you said other than you wanted the car a different color?

A. I am sorry, it is a little bit too far gone, I couldn't remember.

Q. Would you deny that the man asked you for authority to——

A. He said it was all taken care of by the Allstate.

Q. He said that much, that it was all taken care of by Allstate? Now, you recall that. What else did he say? [57]

A. That is all he said. He said he was going to repair the car. I said, if you do repair the car, then I wanted it painted black.

Q. Isn't it a fact that he asked you for authority to go ahead with repairs?

A. On the black, yes, if he is going to repair it.
The Court: On the what?

The Witness: Paint it black, if he is going to repair it.

Mr. Walcom: Q. Didn't ask you for any authority to repair the car itself?

A. Not that I recall.

Q. Mr. Erickson, you say you never again heard from Ansel Schloss until some months later the car was going to be sold? A. That's right.

Q. You never went down to Ansel Schloss at all, never inquired as to the cost of the repairs?

A. No, I did not, sir.

Q. As a matter of fact, Mr. Erickson, isn't it the

(Testimony of Oscar F. Erickson.)

truth that you deliberately had nothing to do with securing the payment for the damage to your car at Ansel Schloss on the advice of your counsel because he was filing a lawsuit? A. That's right.

Q. Yes. Now, going back to this car, this car had about [58] 40,000 miles on it at the time of the accident, didn't it? A. About 35.

Q. About 35,000? A. Something like that.

Q. Actually it had been a new car in March of '51 when you purchased it from Greenwood Studebaker Agency down in Bishop, isn't that true?

A. That's right.

Q. And you had driven about 35,000 miles?

A. I imagine something like that.

Q. Something like that. And from the time that you got it in March of 1951 you drove it for a year, through 1952, and then you drove it through February of 1953, is that correct? A. Right.

Q. In other words, you had had that car about 23 months before this accident happened?

A. That's right.

Q. And it had about 35,000 miles on it?

A. That's right.

Q. How many times had it been in collisions prior to this particular accident, if you know?

A. Twice before.

Q. Now, there came a time, Mr. Erickson, when on or about the 24th of March, you received a letter from Allstate Insurance Company, which is an exhibit in this case, signed by a Mr. Daly, I think it is, dated March [59] 24, 1953, advising you that

(Testimony of Oscar F. Erickson.)

the Allstate Insurance Company was reserving all its rights? A. It was the 27th.

Q. The 27th you received it, I see. The letter is dated the 24th. A. The 17th——

Q. Yes, did you have any dealing with anyone at Allstate thereafter, sir? A. No, sir.

Q. And then subsequently after receiving that letter of reservation of rights, in April of 1953 you received a letter of disclaimer, which is in the file here, isn't that correct? A. Correct.

Mr. Walcom: Thank you, that is all.

The Court: I don't seem to have the letter.

Mr. Walcom: I thought counsel put that in evidence.

Mr. Friedman: Is that the one addressed to me?

The Court: The last one I have is March 24, that I see.

Mr. Friedman: That is the first time he knew about it——

Mr. Walcom: These reservations of rights, if I may approach the Bench?

The Court: I don't have any letter. [60]

Mr. Walcom: I will put it in then. Withdraw the question for this time, then. That is all, Mr. Erickson.

Redirect Examination

Mr. Friedman: Q. Mr. Erickson, you decided not to go near Ansel Schloss after you received the last letter in which the State Farm told you in writing that they were probably going to not pay under your policy, is that not right?

(Testimony of Oscar F. Erickson.)

A. Right.

Q. And then is when you consulted with me?

A. Correct.

Q. That was after that last letter?

A. That's right.

Q. Up until that time you had been dealing yourself with these people, is that right?

A. Right.

Q. Now, Mr. Erickson, I didn't go into it on the previous examination, I ask the Court's permission to let me go into the nurses' bills. For some reason I have overlooked that.

Mr. Erickson, did you ever see this bill addressed to your wife, Mrs. O. F. Erickson, for nursing services, six days at \$15 per day, by Mrs. Herman Matson, total \$90? A. Yes, sir.

Q. And do you have personal knowledge of when that service [61] was performed for your wife, and where, will you tell us, please?

A. That was in her home taking care of her after she got out of the hospital.

Q. Whose home?

A. Herman Matson's home.

Q. That is Herman Matson's home in Ft. Bragg? She took care of your wife for six days?

A. Six or eight days, something like that.

Mr. Friedman: I would like to offer this.

Mr. Walcom: I will object to it, if the Court pleases. The coverage on this policy only requires the—rather, requires the services of a professional

(Testimony of Osear F. Erickson.)

nurse and there is no evidence that Mrs. Herman Matson is a professional nurse.

Mr. Friedman: Q. Mr. Erickson, what is Mrs. Matson's qualifications as a nurse?

A. She is a nurse's aid.

The Court: What?

The Witness: She is what they call a practical nurse, not a nurse—registered nurse.

The Court: Where does she do her work?

The Witness: Used to work at the hospital at Ft. Bragg.

Mr. Friedman: Q. Did she actually work in the Ft. Bragg Hospital as a nurse?

A. Oh, yes. [62]

Q. How long did she do that?

A. Three or four years.

Q. Does she ever do private nursing?

A. Yes.

Mr. Friedman: Your Honor, I submit that she would qualify under the general terms of this policy. I don't know it says registered.

The Court: No, it doesn't.

Mr. Walcom: Professional is the term.

The Court: May be admitted and marked with the next number, 11. \$90?

Mr. Friedman: \$90, Your Honor.

(The nurse's bill above referred to was marked Plaintiff's Exhibit No. 11 and received in evidence.)

Mr. Friedman: Q. That was within the—well, within a year of the accident, was it not?

(Testimony of Oscar F. Erickson.)

A. Right after she left the hospital.

Q. Did your wife ever receive any other nursing care? A. Yes.

Q. Who was that from?

A. Mrs. Michaelson in San Lorenzo, she is a registered nurse, came up to Ft. Bragg and took care of my wife, and in turn, my wife went to her place in San Lorenzo and took care of her there.

Q. Give us some idea of the periods involved.

A. Well, a couple of months, two or three months.

Q. What months, can you tell us what months that was? A. No, I can't, offhand.

Q. Now, did you ever see this lady since this accident, yourself? A. Yes.

Q. As a matter of fact, did your wife go to San Lorenzo? A. Yes.

Q. You drove her there? A. I did.

Q. And have you ever seen a bill prepared by Mrs. Michaelson for her services? A. Yes.

Q. What is the amount of that bill?

A. \$650.

Mr. Walcom: Just a moment, Mr. Erickson.

If the Court please, I am going to object to this and I want to state my reason. On the 9th of December, 1953, interrogatories were presented to the plaintiff here; they were not answered until July of 1954. Subsequently we appeared before Your Honor to require certain answers to be made to the unanswered portions of those interrogatories. In the original interrogatories answers were given

(Testimony of Oscar F. Erickson.)

as to various bills, which included this item of \$90, which I [64] don't contest, Your Honor, because if there was any contest it was incumbent upon us, having been apprised, to make some investigation. But here this morning, coming into this court after interrogatories have been answered under oath setting forth in itemization, as the record reflects, every item of special damages, we are now presented with a bill which doesn't exist, or something, and I suggest, Your Honor, it is only an attempt to overcome the impediment of jurisdiction in this case.

They certainly could have presented a bill since 1953, February and March of 1953, through now, September, or rather October of 1954, if such a bill existed.

Mr. Friedman: Your Honor, counsel is quite right. It is very important that this bill be presented to the court, and I am attempting to elicit from this witness, and I will also subsequently from Mrs. Erickson, the reasons that this wasn't filed, presented before. The Court——

In reference to jurisdiction, the Court is quite familiar with the rule that there will be a liberal amount of amendments to pleadings to permit the plaintiff to show these damages to support the allegations of jurisdiction.

I have here—amending complaint, permissible instead of dismissal, should not be dismissed if plaintiff desires an amendment. In 28 Fed. Supp.—

Mr. Walcom: Not talking about amendments.

(Testimony of Oscar F. Erickson.)

The Court: We are talking about evidence.

Mr. Friedman: That is right. Your Honor may recall at the opening of the case I made an offer of an amendment, there was objection, the Court seemed to admit and allow the admittance I suggested at the very opening of the trial, to allow this particular bill, and I think it is very important.

The Court: I never allowed any bill, counsel.

Mr. Friedman: I mean, excuse me, the damages alleged.

The Court: That wouldn't cover this point. We are talking now about the evidence, about a bill.

Mr. Friedman: I am attempting here, Your Honor, to enable these plaintiffs to show the Court that they are obligated to pay an additional \$700 for medical services, and it is admitted that these were not placed in the answers of the interrogatories: previously at the opening of the case I submitted this question to the Court and told the Court that the plaintiff here wanted to expand these answers to include this item of damage.

I feel that since the jurisdictional amount is very important here——

The Court: Counsel, there is a lot of conversation here by both of you, but I am just talking about the issue that is before me right now.

Now, what did you say, Mr. Walcom? What was your [66] objection to this?

Mr. Walcom: I say, in all fairness——

The Court: Just state your objection.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: My objection is, we have had no opportunity here under the interrogatories.

The Court: What is the interrogatory that you asked for?

Mr. Walcom: Interrogatory No. 15.

“Please list the names of all doctors who have submitted bills to you on behalf of Mrs. Birdella Erickson and the amounts of any bills incurred as a result of injuries suffered by her on February 15, 1953.”

And the names of doctors and copies of medical reports. In response to that, counsel, in his response to Interrogatory No. 15, listed at considerable length on page 2 and 3 these items: Cost of removal to the hospital, \$15; Dr. Barnes, \$231.50—that is for Birdella. For Fred Erickson, \$21. Stanford-Lane Hospital, and the doctors are \$81. Then there were the drugs and pharmacy, x-rays and bills like Mrs. Herman Matson for nursing care, with a total of \$476.27.

Those were the bills in July of 1954, a year and some four or five months afterwards, upon which we could rely as we come into this case.

The Court: What is your explanation, counsel?

Mr. Friedman: The explanation——

The Court: As to why it wasn't included there.

Mr. Friedman: I think the explanation is that my clients told me at that time that they had, she had received, Mrs. Erickson had received this nursing care, but that she was having difficulty having a bill delivered to her by the lady that furnished

(Testimony of Oscar F. Erickson.)

the care, and that for that reason, because the bill had not been delivered, I did not place it in the answers.

But I submit, that is what I am attempting to offer here, an explanation of the fact that the services were performed, that there is an obligation, that the lady prepared a bill actually, but for personal reasons did not deliver it, and that under the law these plaintiffs are obligated to pay that, and that is the reason it was not in the answers because we hadn't actually received a bill, but the services were performed, and I submit the obligation is owed the registered nurse to perform these services, and actually Mrs. Erickson's willingness, a bill was prepared and itemized but not delivered to her.

The Court: The purpose of the interrogatories is to advise counsel of all facts that he may get prior to trial and should have been included.

However, the language of the interrogatory says, "amounts of any bills incurred". [68]

Mr. Friedman: I submit it is a bill incurred, Your Honor.

The Court: Why didn't you answer it, then?

Mr. Friedman: Because—I am at fault, I felt the bill hadn't been delivered, that it wasn't proper, but I have changed by view at this time, and I feel that under the law, since it would involve a jurisdictional question—in other words, if this bill is not allowed we may not fall within the \$3,000 amount and since it was a legitimate bill which was incurred

(Testimony of Oscar F. Erickson.)

and the actual written bill was not delivered, that it is only fair.

Counsel is not suffering here; I don't see what they are losing under these circumstances. The main issue is whether or not there has been a fraud practiced upon the defendant Allstate, not what the actual amount of the bills are.

If justice is to be served, and that is the bill, it seems only fair that these people, if I was at fault in not including it, certainly the Court can allow it at this time because there is no harm that I can see here to the Defendants, they were obligated to pay their bills.

The Court: I think, I am inclined to think that the Court would have the discretion, if it is not proper, to exclude the bill.

However, I am going to let you produce evidence concerning [69] it.

Mr. Friedman: Thank you very much.

Q. Mr. Erickson, you say you took your wife down to San Lorenzo? A. That is right.

Q. To this lady. What was her name?

A. Mrs. Michaelson.

Q. And she is a registered nurse?

A. Yes, sir.

Q. And how long did your wife stay there with her?

A. Well, I can't recall just how long she was down there, for at least a month or two.

The Court: Now, Mr. Erickson——

The Witness: Yes, sir.

(Testimony of Oscar F. Erickson.)

The Court: You're under oath, and I expect you to give us your best judgment. I think you can come a little closer to answering than by saying she was there a month or two.

The Witness: Well, she was there for a while and I took her home and Mrs. Michaelson stayed at my place and took care of her, and I took her back to San Lorenzo again because she went to the Stanford-Lane Hospital with a head injury.

Mr. Friedman: Q. The Court is trying to ascertain, give us as close as possible what months was this when this happened? [70]

A. That was about two months after the accident she was permitted to go down to the City.

Q. The accident occurred on February 15, so that would be some time in April?

A. That's right.

Q. Your wife went down there and stayed then?

A. That is right.

Q. For how long?

A. About a month, I will say.

Q. And then did she come back to Ft. Bragg?

A. Yes, sir.

Q. How long did this lady stay with her there?

A. Stayed there about two weeks.

Q. Have you ever seen a bill prepared by this lady?

A. I have never seen it myself, but my wife has.

Q. You haven't seen it? A. No, sir.

Mr. Friedman: I will have to get that from Mrs. Erickson, Your Honor.

(Testimony of Oscar F. Erickson.)

Recross Examination

Mr. Walcom: Q. Mr. Erickson, on your redirect examination, did I understand you to say that Mrs. Erickson was taking care of Mrs. Michaelson in turn? A. Sir?

Q. Was she in turn taking care of Mrs. Michaelson at any [71] time?

A. Not that I know of.

Q. As a matter of fact, Mrs. Michaelson was a family friend, I take it?

A. Not necessarily, no. She worked at the hospital.

The Court: She what?

The Witness: She worked at the Ft. Bragg Hospital for about 20 years.

Mr. Walcom: Q. You knew her as an old resident of Ft. Bragg?

A. Well, I knew all the nurses up there.

Q. And she was a family friend?

A. Well, like any other nurse is a friend, yes; not necessarily.

Q. Have a lot of nursing friends, sir?

A. Oh, I have quite a few of them, yes.

Q. And your wife's visit down here was to visit a friend, was it not? A. No.

Q. As a matter of convenience?

A. She is taking care of her husband in San Francisco. Her husband lives in San Lorenzo.

The Court: Mrs. Michaelson lives in San Lorenzo?

The Witness: Yes, Henry Michaelson is his name.

(Testimony of Oscar F. Erickson.)

The Court: And you say she was taking care of him? [72]

The Witness: That is her husband.

The Court: Is he ill?

The Witness: Well, he was here at the time my wife——

The Court: She was taking care of her husband who was ill?

The Witness: No.

The Court: You said her husband was ill; was he or not?

The Witness: No, I said her husband lives in San Lorenzo.

The Court: Was she ill?

The Witness: Not Mrs. Michaelson, my wife was, yes.

Mr. Walcom: Q. Your wife was living over at Mrs. Michaelson's and then she would go over to the Stanford-Lane Hospital for treatment?

A. That's right.

Q. Your wife wasn't in bed?

A. No, not to my knowledge.

Mr. Walcom: That is all.

Redirect Examination

Mr. Friedman: Q. Did Mrs. Michaelson perform nursing care for your wife at that time?

A. That is right.

Q. What was its nature, do you know?

A. I don't know, not more than nurses do, gave

(Testimony of Oscar F. Erickson.)

her shots [73] and stuff like that and drugs for her head injury.

Recross Examination

Mr. Walcom: Q. Mr. Erickson, you never saw Mrs. Michaelson give your wife any shots of medicine, did you?

A. No, I never seen it myself, no.

Mr. Walcom: That is all.

Mr. Friedman: I have no other questions, at this time, Your Honor.

The Court: That is all.

(Witness excused.)

Mr. Friedman: Is the representative of Mr. Schloss here?

JOE AIELLO

called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

The Court: What is your name, please?

The Witness: Joe Aiello.

Direct Examination

Mr. Friedman: Q. Mr. Aiello, you're here in response to a subpoena served on Ansel Schloss, is that right?

A. For the car being repaired.

Q. For the repair bills. Will you look at those, please? Who ordered the repairs?

Mr. Walcom: Just a moment.

Mr. Friedman: Q. Whose car is involved there?

A. Mr. Oscar Erickson. [74]

(Testimony of Joe Aiello.)

Q. Can you tell us the kind of car that is?

A. It is a Studebaker, model H, license 5U 8846.

Q. When did the car reach Ansel Schloss?

A. This bill is dated 3/10/53.

Mr. Walcom: I will ask that go out as not responsive, if the Court pleases.

The Court: Do you know when the car got there?

The Witness: No, sir.

Mr. Friedman: Q. Do you know from looking at those records who ordered the repairs?

Mr. Walcom: I will object to that as calling for an opinion and conclusion of the witness.

The Court: I think it does.

Mr. Friedman: Right from the record, Your Honor.

Mr. Walcom: Same objection to the records.

Mr. Friedman: Q. Are these records kept in the ordinary course of business by this company?

A. Yes, sir.

Q. Now, referring to automobile repair estimate——

The Court: What is the purpose?

Mr. Friedman: The purpose, Your Honor, is to show the work was ordered by the representative of Allstate, and not by Mr. Erickson.

The Court: Well, so what?

Mr. Friedman: Well, the purpose, the only thing there [75] is that Erickson has lost his car.

The Court: The value of the car would be de-

(Testimony of Joe Aiello.)

terminated by its market value as of the time, wouldn't it?

Mr. Friedman: Well, on that point, Your Honor, I would submit that Your Honor is quite correct in that view. On the other hand, the law does allow a party who owns a vehicle to place an estimate of value.

The Court: He has done that.

Mr. Friedman: Pardon me?

The Court: He has done that.

Mr. Friedman: Yes, he has done that, that is the only purpose.

The Court: He has done it. He is permitted to testify as to the value of the car and Mr. Erickson has given his estimate.

Mr. Friedman: Yes, and the only purpose here was to show that this work had been ordered by Allstate and not by Mr. Erickson. Mr. Erickson testified his car was a total wreck.

That is all.

The Court: Any questions?

Cross Examination

Mr. Walcom: Q. Mr. Aiello, were you employed by Ansel Schloss at the time of—February or March of 1953? A. Yes, I was. [76]

Q. But I take it you had nothing to do with this particular transaction at that time?

A. No, sir.

Q. May I just see these records that were subpoenaed, sir? I want to take a look at them.

(Testimony of Joe Aiello.)

You have already advised us that these are records which are ordinarily and regularly kept in the course of business of Ansel Schloss in San Francisco, is that correct? A. Yes.

Q. Regular business entries.

Mr. Walcom: May we have these marked for identification at this time, if the Court please?

The Witness: I would like to have the originals.

Mr. Walcom: Let me say this, Mr. Aiello, the Court will take care of these and they will be returned to you at the conclusion of the case.

May we have this marked as Defendant's Exhibit No. 1, if the Court pleases?

The Court: Defendant's Exhibit B for identification.

(The records above referred to were marked Defendant's Exhibit B for identification.)

The Court: Is that all?

Mr. Walcom: That is all.

The Court: That is all. Step down.

(Witness excused.) [77]

The Court: How long do you expect to take, counsel?

Mr. Friedman: I shouldn't take—I only have one objective now, to show evidence as to the nursing services performed by this——

The Court: How long do you expect to take, counsel?

Mr. Walcom: I would say about an hour and a half, Your Honor.

The Court: It was sent in as a half-day case, the reason I asked the question.

Mr. Walcom: Lawyers are always optimists, Your Honor. I think we were advised by Mr. Friedman that he would take the better part of the day this morning.

Mr. Friedman: I felt we could stipulate to a great deal; however, we are having some difficulty on that, getting much done by stipulation.

Mr. Walcom: I am sure it will not take more than an hour and a half, Your Honor.

Mr. Friedman: Your Honor, as a matter of fact, the evidence is limited to just the documents that are there and proof of the damages. I don't think that should take very long. If it is expanded, of course, to include conversations had with my people, it would take considerably longer.

The Court: We will take a recess at this time; I thought maybe we could finish by running to 1:00 o'clock and then be [78] through, because it was sent in as a half-day case, but if that can't be done, why, we will take a recess at this time until 1:45 p.m.

(Whereupon, an adjournment was taken until 1:45 p.m. of the same day.) [79]

Afternoon Session—October 15, 1954

Mr. Friedman: Will you take the stand?

BIRDELLA ERICKSON

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: State your name, please.

The Witness: Birdella Erickson.

Direct Examination

Mr. Friedman: Q. Are you the wife of Mr. Erickson, who just testified this morning?

A. Yes, I am.

Q. And Mrs. Erickson, are you the party who was driving the car involved in this case on or about the 15th day of February, 1953?

A. Yes, I was.

Q. And you have heard the testimony of Mr. Erickson this morning of your receiving treatment at the Ft. Bragg Hospital, is that true?

A. That is true.

Q. And that was the result of the accident, as far as you know? A. Yes.

Q. And you also heard Mr. Erickson's testimony as to your receiving care, nursing care, from a lady whose bill we have included in evidence. What was her name again? [80]

A. Mrs. Michaelson or Mrs. Matson.

Q. Mrs. Michaelson or Mrs. Matson?

A. That's right.

Q. There is a question about the bill of Mrs.

(Testimony of Birdella Erickson.)

Michaelson. Would you please tell the Court what, if anything, Mrs. Michaelson did for you in the way of nursing? A. Well——

Mr. Walcom: Just a moment, Mrs. Erickson. I will object to this as incompetent, irrelevant and immaterial, Your Honor, as to whether or not there has been a bill.

Mr. Friedman: Well, leading up to that, Your Honor.

The Court: I think they are entitled to show what the facts are.

A. We were living in Booneville, and in Booneville there was no doctor or no nurses, so I had to get outside help, so I got a woman living in the community to take care of me. But my doctor in Ft. Bragg told me that I needed someone that could watch over me more thoroughly than that the major portion of the time.

However, I was able to be up and around, but I wasn't able to take care of my household chores and to do for myself.

The Court: Well, then, did you have someone in to do your household chores?

The Witness: That is true; I had a neighbor lady, but [81] the doctor in Ft. Bragg didn't think she was quite right, he wanted to put me back into the hospital, back in Ft. Bragg, and I didn't want to go, so then it became necessary for me to get somebody else that the doctor approved of to take care of me.

Mr. Friedman: Q. Now, you say to take care of

(Testimony of Birdella Erickson.)

you. Which doctor is this that is doing this, advising you this way?

A. This is Dr. Barnes.

Q. He is at the Ft. Bragg Hospital?

A. That's right.

Q. And then what did you do in reference to that?

A. Well, then, we telephoned Mrs. Michaelson and asked if she could come up for a few days, which she did, and then I returned, or then she went back to San Lorenzo.

The Court: When she came up there, how long did she stay?

The Witness: Well, Your Honor, it was a period of nearly a week, because her husband came back from overseas, and she felt that she couldn't stay with me when her husband was home in San Lorenzo.

The Court: How long did she stay?

The Witness: Oh, approximately a week.

The Court: When you talked to her about coming up there, did you—what was said about paying her, if anything? [82]

The Witness: Well, knowing that she was a registered nurse and feeling that she was capable, I felt that I was obligated to pay her.

The Court: Did you hear my question, Mrs. Erickson? I said, what was said about paying her?

The Witness: Well, in discussing a bill at that time, we didn't.

The Court: You didn't talk about paying her?

(Testimony of Birdella Erickson.)

The Witness: No, not about paying her, no, sir.

Mr. Friedman: You knew this lady very well, did you not?

A. Yes, I have known her over a period of years, yes, sir.

Q. And you called her up and you knew her qualifications as a registered nurse?

A. That is true.

Q. You didn't discuss a bill with her at that time? A. No.

Q. She left, you say, within approximately a week? A. That is true.

Q. And returned to San Lorenzo?

A. That is right.

Q. Did you stay in Booneville or did you go down to San Lorenzo?

A. I believe my husband took me to San Lorenzo after she left. [83]

Q. How long after was that?

A. Within a period of three or four days.

Q. And did you stay with her down in San Lorenzo? A. That is true.

Q. Did she perform any nursing services for you in San Lorenzo?

A. Not any more than what Dr. Barnes prescribed, and mostly it was being kept quiet and having someone near me, not being left alone.

Q. Put it this way: Did you do any of the cooking or the house cleaning, doing any of the chores down there?

A. No, she waited on me totally, even to the—

(Testimony of Birdella Erickson.)

well, I went to bed, and got up in the morning, and she prepared my meals and served them to me.

Q. Now, how long did you stay there in that status?

A. Well, at that time I was there was also about the time I went into Stanford-Lane Hospital for extra care, and this, too, was under the advice of Dr. Barnes, and so it was her travelling with me from San Lorenzo and going with me to the hospital and having a person with me and not being alone.

Q. Will you tell us, please, what period of time this occurred, over what period of time?

A. This is for practically three weeks.

Q. That is, one week up in Booneville and three weeks down there? [84]

A. That's right.

Q. Did you stay there or leave there?

A. Yes, and then I felt I was able to go back home. In fact, I was anxious to return to Booneville, which I did.

Q. Can you give us the approximate date you returned to Booneville? Approximately, within a week or two weeks?

A. I am afraid I can't; it was approximately two months after the accident.

Q. That you returned to Booneville?

A. That's right.

Q. You feel you had been down there about, would you say, three weeks?

A. That's right, that is correct.

Q. Is the total amount of nurses' care then, one month for Mrs. Michaelson?

(Testimony of Birdella Erickson.)

A. That is true, with the exception that I would come back and stay in her home on my other trips that I went up to Stanford-Lane.

Q. Oh, I see. How much time was that altogether?

A. I made three or four trips back down to Stanford-Lane. Each time I would stay with Mrs. Michaelson in San Lorenzo.

Q. Was this being done—put it this way: Did you reach any understanding at that time with her about a bill for her services?

Mr. Walcom: Just a moment. I will object to any [85] understanding, if the Court please.

Mr. Friedman: I will rephrase it.

Q. Did you ever have a conversation with her during that period as to her being paid for the services? A. Yes.

Mr. Walcom: Just a moment. I will object to that as hearsay, if the Court pleases.

Mr. Friedman: It is a conversation of the witness herself. I realize that party is not here, but trying to establish the reason no bill was submitted here.

The Court: Who are the plaintiffs in this action?

Mr. Friedman: Mr. Erickson is the plaintiff, Your Honor. Her husband.

The Court: The objection made that it is hearsay, it is as to——

Mr. Friedman: Well, withdraw the question.

Mr. Friedman: Q. Was a bill ever prepared to your knowledge, in your presence, which was made

(Testimony of Birdella Erickson.)

out to Mr. Erickson for nursing services performed for you by this lady, Mrs. Michaelson?

Mr. Walcom: Just a moment. I will object to that, if the Court please, as incompetent, irrelevant and immaterial. The best evidence would be the bill.

Mr. Friedman: Well, Your Honor, that may be.

The Court: I will permit the answer; yes or no on this [86] question.

The Witness: Yes.

Mr. Friedman: Q. You did see such a bill?

A. Yes.

Q. And where and when did you see that?

A. I saw that in Mrs. Michaelson's home.

Q. When was that, approximately?

A. It was approximately two months or three months after I had visited her the last time when I had came back and spent a night in her home, or spent another evening with her.

Q. What was the amount of that bill?

A. I don't remember the exact figures, because I didn't go over it too thoroughly, or check her figures, but I know it was close to \$700.

Q. All right. Why didn't you receive that bill, or why don't you have that bill with you?

Mr. Walcom: Just a moment. It is incompetent, irrelevant and immaterial why she wouldn't have it, Your Honor.

The Court: As to why she doesn't have it, I think is cross-examination of your own witness.

Mr. Friedman: All right.

(Testimony of Birdella Erickson.)

Mr. Friedman: Q. You don't have that bill, do you? A. No, I don't. [87]

Q. Is that the fair reasonable value of her services?

Mr. Walcom: Just a moment. I will object to that as incompetent, irrelevant and immaterial and no foundation laid, if the Court pleases, to this witness' qualifications to establish reasonableness of a document not in evidence.

The Court: I think the objection is well taken.

Mr. Friedman: Q. Mrs. Erickson, are you and your husband, Mr. Erickson, obligated to pay this sum of approximately \$700 to Mrs. Michaelson for her services performed for you as a nurse?

Mr. Walcom: Just a moment, Mrs. Erickson.

If the Court please, I object to that as calling for the opinion and conclusion of this witness.

The Court: Sustained.

Mr. Friedman: Q. Do you owe, you and Mr. Erickson, owe this lady \$700?

Mr. Walcom: I will make the same objection, if the Court please, and also in evading the province of the Court.

Mr. Friedman: I don't see it myself, Your Honor.

The Court: Sustained.

Mr. Friedman: I am trying, I don't know how to do it any other way to present to the Court the fact that the——

The Court: Counsel, I am not very much im-

(Testimony of Birdella Erickson.)

pressed by that claim, frankly. I have heard the story and it doesn't carry very much weight with me.

Mr. Friedman: Well, of course, if the Court feels that way—I mean, I just want to get in evidence the fact that to show the services were performed and the fact that she is obligated to pay her.

The Court: If the bill had been sent we could then examine the person who was making the claim for that amount. We don't have that, and the circumstances explained by the witness—it doesn't look like a relationship of nurse and patient to me. I think that could be developed by a few questions.

Mr. Friedman: I see.

Mr. Friedman: Q. Mrs. Erickson——

Mr. Friedman: I have asked every question I can think of in that respect. The testimony here before the Court is that the nursing services have been performed for a period of four weeks. There was a discussion about the bill, but a bill was prepared and not actually delivered in the sum of \$700. I don't know what I can ask her to show the relationship.

The Court: Well, proceed. I will have to rule on it as they come up.

Mr. Friedman: Q. Do you intend to pay Mrs. Michaelson the sum of \$700 for her services?

Mr. Walcom: Just a moment. I will object to that, if the Court pleases, there is no evidence of any bill. [89]

Mr. Friedman: Your Honor——

Mr. Walcom: Let me finish, please, Counsel.

(Testimony of Birdella Erickson.)

This witness is not part of this action.

Mr. Friedman: Naturally she is not a party *per se*, but the insurance policy is in the name of Mr. Erickson, and the policy covers the bills and suing for his spouse and—in other words, the major bills were, as far as medicals are concerned, her bills, not his bills, the company is obligated to pay all these bills if they are proved to the satisfaction of the Court. Now, we don't always have bills in cases where people perform services, that does not necessarily dispense with the *sine quo non* of the obligation to pay.

The Court: The policy provides to pay all reasonable expenses incurred for necessary professional nursing services. Now, so far the evidence is not that the bill was incurred for professional nursing services.

Mr. Friedman: Q. You know Mrs. Michaelson is a registered nurse, isn't that correct?

A. That is true.

Q. Has she been working at her profession the last few years?

Q. Yes, but it's intermittently. She doesn't work as a steady nurse.

Q. Were these services she performed for you in the nature [90] of professional services performed by a registered nurse?

Mr. Walcom: Just a moment, Mrs. Erickson.

If the Court please, I will object to this as calling for a conclusion of this witness, and the entire line

(Testimony of Birdella Erickson.)

of interrogation is self-serving. Object on both those grounds, if the Court please.

Mr. Friedman: Have to ask these questions, Your Honor, because there is no other way of showing the Court what was done here.

The Court: I think that would be better if you showed what was done and have the Court determine it.

Mr. Friedman: Q. Have you told us everything that this lady did for you?

A. I believe so.

Q. Was there anything else in the nature of the nursing services that could be done for you after that time?

Mr. Walcom: I will object to that as incompetent, irrelevant and immaterial what might have been done or could have been done.

Mr. Friedman: Q. Did the Doctor order these services to be performed?

A. That is true.

Q. Did the doctor say what they were to be?

A. Yes.

Q. Will you tell us what he said about them?

Mr. Walcom: Just a moment. I am going to object to that as hearsay evidence.

The Court: I think she can say what was done for her, counsel.

Mr. Friedman: She has testified already that the doctor, that is, the services consisted of cooking for her, accompanying her.

(Testimony of Birdella Erickson.)

Mr. Friedman: Q. Were there any drugs administered by this woman to you?

A. Yes, but in, only in pill and capsule form. She took care of the medicines that was prescribed.

Q. She did do that? A. Yes.

The Court: What do you mean, "She took care of it?"

The Witness: Well, when it was time to take pills, she brought me the glass of water and the pills.

The Court: Couldn't you do that yourself?

The Witness: Well, they were drugs of such nature the doctor thought better that a nurse take care of them and handle and take care of me.

Mr. Friedman: Q. Did she administer any shots of any kind to you?

A. No, she didn't.

Q. She didn't? A. No. [92]

Q. Have you told us all the services she performed for you?

A. Within my knowledge, yes.

Mr. Friedman: I have no further questions, Your Honor.

Cross Examination

Mr. Walcom: Q. Mrs. Erickson, you don't mean to say that the doctor told Mrs. Michaelson to go bring you a drink of water when you took a pill, do you? A. No, that isn't true.

Q. I appreciate that. And Mrs. Michaelson was a friend whom you had known for a good many years, isn't that true?

(Testimony of Birdella Erickson.)

A. But not as a very close friend; she was an acquaintance, yes.

Q. And when you come down to San Francisco, you have told us that you would spend a night and on occasions, two, wouldn't you?

A. After she had come up and I had gone down and she had taken care of me, I went back to see her, yes.

Q. And you would spend a night there and that was just a friendly visit?

A. No, I felt it was an obligation to go and see her after she had rendered those services to me.

Q. In other words, you would go, as you say, you felt an obligation to visit this lady?

A. That is true. [93]

Mr. Walcom: Thank you, that is all.

Mr. Friedman: I have no other questions, Your Honor.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Friedman: Your Honor, that is the plaintiff's case.

Mr. Walcom: Now, at this time, if the Court pleases, before presentation of any further evidence on behalf of the defendant, I would like to ask that a judgment of non-suit be entered on behalf of the defendant. And I base that, if the Court pleases, on the fact that the uncontradicted evidence reflects that at the time this application on December 17 was executed, at that time the plaintiff was aware of the fact that he had had his policy of insurance

with the State Farm Insurance Company cancelled effective as of the 27th day of December. And furthermore, that he had knowledge at the time of the receipt of that letter that an insurance company refused to extend insurance to him, and all, of course, within a two-year period preceding the date of his application with Allstate Insurance Company.

Now, I say that because under certain sections of our Insurance Code, which I know Your Honor will follow as the law, that governs this situation, and bearing in mind the Erie case, you must, or should apply the law of the jurisdiction in which this controversy arises. We have before us [94] in our Insurance Code Chapter III, Negotiations before Execution——

The Court: Well, now, counsel, let me interrupt you for a second. I think in Federal Court you have a motion for dismissal rather than a non-suit. I suggest you make that motion and that it be taken under submission, and then if you have any evidence to put on, we can go ahead and consider that all together.

Mr. Walcom: Very well, I shall do that.

The Court: Present your law at that time.

Mr. Walcom: Thank you, Your Honor, I shall defer it. The first witness that the defendant will call is Mr. Cowden. Will you step up here, sir?

G. M. COWDEN

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: Cowden.

Direct Examination

Mr. Walcom: You are Mr. G. M. Cowden, sir, (spelling) C-o-w-d-e-n? A. Yes.

Q. What is your address, Mr. Cowden? [95]

A. My home address or business address?

Q. Well, your business address?

A. 1947 Center Street, Berkeley, California.

Q. And is that the State Farm Insurance Company? A. Yes.

Q. I take it, then, you are employed by that organization? A. Yes.

Q. In what capacity are you employed, Mr. Cowden?

A. I am the underwriting superintendent, presently, of our Southern California Division.

Q. You were so employed by the State Farm, or were employed by the State Farm Insurance Company, in December, 1952, were you?

A. Yes.

Q. And at that time what was your capacity, sir?

A. I was underwriting superintendent of what we referred to as our Northern California Division.

Q. Now, Mr. Cowden, pursuant to a subpoena

(Testimony of G. M. Cowden.)

have you appeared today bring with you records regarding insurance coverage extended to Oscar F. Erickson and Birdella Erickson by this company in that period, December of 1952?

A. Yes, I have.

Q. May I see those, sir?

The Court: There isn't much question about that, Gentlemen. Can't we handle this a little more expeditiously? [96]

Mr. Walcom: Perhaps we can, Your Honor.

Mr. Walcom: Q. Mr. Cowden, you were the author of the letter of December 15th directed to Mr. Oscar Erickson, is that correct, sir?

A. Yes, I signed it.

Mr. Walcom: May we have that exhibit, if Your Honor pleases? Thank you.

The Court: The fifteenth?

Mr. Walcom: Yes, it is the copy, one of the plaintiff's exhibits. I believe it is attached to this letter. Yes.

Mr. Walcom: Q. I will show you, Mr. Cowden, the plaintiff's Exhibit No. 5, which is a letter of December 15, 1952, which is signed, apparently, G. M. Cowden.

A. Yes, the original of this is a form letter which we fill in the spaces and I signed it.

Q. That reflected that——

The Court: The letter speaks for itself, it is in evidence.

Mr. Walcom: Very well, Your Honor.

The Court: Isn't any question about it.

(Testimony of G. M. Cowden.)

Mr. Walcom: In your file I notice, Mr. Cowden, you have a draft payable to O. F. Erickson and/or Birdella A. Erickson for \$11.35 issued on December 15, 1952, payable to their order. Is that the draft that was mentioned in that letter, sir?

A. Yes. [97]

Q. You have prepared a photostatic copy of it, have you not? A. Yes.

Mr. Walcom: May we ask that that be marked as the defendant's exhibit next in order, if the Court please, in lieu of the original?

The Court: Defendant's Exhibit C.

(Whereupon check referred to above was received in evidence and marked Defendant's Exhibit C.)

Mr. Walcom: Q. I am sure your records are stamped cancelled on this policy, are they not?

A. Yes.

Q. And it bears the comment at the top, "Cancelled December 27, 1952——"

Mr. Friedman: Just a moment, you were going to read from this? I don't know the purpose of this at all; Your Honor has stated it is all here, the letter is here, the policy is here, and the issue is clear.

The Court: I would think any communication between their policyholder and the company which was submitted to the policyholder would be admissible, but I don't think any inner-marking on their file is admissible.

Mr. Walcom: Very well, withdraw it, Your

(Testimony of G. M. Cowden.)

Honor. Thank you. That is all, Mr. Cowden. Counsel may cross-examine. [98]

Cross Examination

Mr. Friedman: Q. Mr. Cowden, the effective date of that cancellation was December 27th, 1952, is that right?

A. 12:01 a.m. Standard Time, on that date.

Q. And the check you gave to Mr. Erickson was for the un-expired term of the policy as of December 27, 1952, is that right?

A. The unearned premium from that date.

Q. Thank you.

Mr. Walcom: Just one further word, Mr. Cowden.

The Court: Let me see that.

Redirect Examination

Mr. Walcom: Q. In addition to that letter, stating that the policy was cancelled, with the effective date, you mentioned in your first paragraph that it was your desire to be relieved of liability for insurance for him, did you not? A. Yes.

Mr. Walcom: That is all, thank you.

Examination by the Court

The Court: Q. Mr. Cowden, who did you send this draft to, do you recall?

A. Yes, Your Honor, it was sent to the agent of record of the policy, at that time a Mr. C. D. Van.

Q. Were there any instructions as to what he was to do with it?

A. There were no instructions on the letter itself. However it is established procedure with our

(Testimony of G. M. Cowden.)

company that wherever there is mortgage existing on a vehicle we are insuring that the return premium go through the agent to see whether or not any other interested party has an interest in the unearned premium.

Q. Any instructions to your agents as to what they do with the check? A. No, sir not in the letter.

Q. Well,——

A. Merely through company procedure.

Q. Well, you just don't send a check to the agent without telling him what to do with it.

A. The check was sent with the copy of the cancellation letter.

Q. All right. Wasn't there some statement as to when the check should be delivered to the policyholder? A. No, sir.

Q. Actually have you any record showing when the check was delivered to the policyholder?

A. No, sir, we do not.

Q. I can't read these cancelled stamps very clearly, but it appears to me to be cancelled on February 5, 1953, is that [100] right?

Mr. Walcom: It may be clear on the original. May we see the original, Mr. Cowden?

Yes, there is a clearing house stamp, if the Court please, says February 5, 1953.

The Court: I think that is what the perforation says that it was paid.

Mr. Walcom: Yes, Your Honor.

The Court: The perforations in the check show paid 2-5-53.

(Testimony of G. M. Cowden.)

Mr. Walcom: They didn't get it until much later.

The Court: All right, fine. That is all.

(Witness excused.)

Mr. Walcom: Mr. Gamber.

VAL GAMBER

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: Val Gamber.

Direct Examination

Mr. Walcom: Q. Would you state your address, Mr. Gamber?

A. Residence is 210 Brown Street, and business is 455B, Santa Rosa. [101]

Q. And what is your business or occupation?

A. Insurance Agent.

Q. By whom are you employed?

A. Allstate Insurance Company.

Q. Was that your employment, Mr. Gamber, December of 1952? A. Yes, sir.

Q. Calling your attention to a document—may I have the application?—to this document, which is the plaintiff's Exhibit No. 3. Mr. Gamber, do you recognize that? A. Yes, sir, I do.

Q. And is that a copy, a carbon copy of an application taken by you on that day?

A. It is.

(Testimony of Val Gamber.)

Mr. Walcom: Now, I will offer this at this time.

Mr. Friedman: What are you reading from?

Mr. Walcom: The original of that.

Mr. Walcom: Q. I will ask you if you recognize this document I hand to you?

A. Yes, sir.

Q. Is this the original application of which Plaintiff's Exhibit No. 3 is a carbon copy?

A. It is.

Q. And I notice on the reverse of the Plaintiff's copy there is certain information there entitled "Conditions Respecting Binder and Non-Binder," is that correct? [102]

A. That is correct, sir.

Q. And so that the Court and counsel and all of us will be apprised in the manner in which you take these applications, I have secured copies of this form R16-21, which is the number of that form.

Mr. Friedman: May I see that, please?

Mr. Walcom: And I will give you, counsel, some copies so you may observe them.

Mr. Walcom: Q. And I will ask you whether or not these are issued, whether these are drawn in triplicate, Mr. Gamber? A. They are.

Q. And the original copy is the one which you have before you? A. Yes.

Q. This folder, which we will presently put in evidence, and the carbon copy, goes to the applicant, is that correct? A. That is correct.

Q. The third copy of that remains in the book as your memorandum, is that correct?

(Testimony of Val Gamber.)

A. Yes.

Q. All right. Now, Mr. Gamber, in addition to—first of all, do you recall about what day, what time of the day or night that you were seen by Mr. Erickson on this particular occasion?

A. The application reads 6:05. I imagine it would be a [103] Thursday night, because we were open until nine that day, I should say.

Q. First of all, did you ask him whether or not within two years that any insurer ever cancelled any automobile insurance issued or refused any automobile insurance to him or anyone in his household, did you ask him that question?

A. Yes, I did.

Q. What was his reply? A. No.

Q. And did you ask him,—first of all, what was the purpose of asking him that question?

Mr. Friedman: Your Honor, I am going to object to the purpose. I would imagine it is rather obvious on the face what the purpose must be and——

The Court: I think he can testify what was said there at the time, Counsel.

Mr. Walcom: Q. Will you tell us what was said in sum or in substance, Mr. Gamber, from the time Mr. Erickson came to you there, just what was said by you and by Mr. Erickson.

A. Well, it would be rather hard to describe everything you did. I don't believe my recollection would serve me that way.

(Testimony of Val Gamber.)

The Court: Mr. Gamber, this is an agency that does business in Sears & Roebuck?

The Witness: That is right. [104]

The Court: This is a Sears & Roebuck store?

The Witness: Yes, sir.

The Court: You have a little booth?

The Witness: That's right.

The Court: At the store, you are behind a booth and people come up and make applications for insurance?

The Witness: That's right.

The Court: Is that the way they normally do in every Sears store?

The Witness: Right.

The Court: Do you have any recollection of a particular conversation with this plaintiff?

The Witness: No, sir, other than our normal way of doing business, and the first thing we ask an individual is if they have had insurance cancelled or refused; if they have it is then necessary to put them on assigned risk if they cannot secure insurance through other means, and had I known at the time——

The Court: Those are the instructions you get?

The Witness: Yes, that is Company procedure, yes, sir.

Mr. Walcom: Q. At the base of that form which you have, both in the plaintiff's Exhibit before you, and in the original, there is a portion there which says "Binder" and "Non-Binder", isn't that correct? A. That is correct. [105]

(Testimony of Val Gamber.)

Q. Now, the "Binder" says that: "Subject to the conditions on the reverse side, the Company hereby binds the insurance applied for, to become effective at 6:05 p.m., 12-17-52." Is that correct, sir?

A. That is correct.

Q. What is the meaning of the term "Binder", Mr. Gamber?

A. The Company is on the risk at that particular time.

Q. In other words, the risk attaches immediately? A. Yes, sir.

Q. What is the significance of "Non-Binder", which is crossed out, which was not completed on that occasion?

A. "Non-Binder" means that the application is made under writing and isn't approved until after the investigation is made.

In other words, we would write an application on him, a Non-Binder, if there is anything unusual or something undesirable about the risk, that would be entirely an underwriting matter.

Q. Are you permitted to bind insurance if you are informed that there has been a refusal or cancellation of previous existing insurance?

A. No, sir.

The Court: You received such instructions?

The Witness: Yes, we have, sir.

The Court: From your superiors?

The Witness: That is right.

Mr. Walcom: Q. Mr. Gamber, in addition to the information on the face sheet of this page, which is

(Testimony of Val Gamber.)

exactly the same as the plaintiff's exhibit, we have a reverse questionnaire, and I will ask you whether or not all of that information contained in there—tell us how is it obtained?

A. Well, there is a series of questions which we normally ask each individual. That generally follows down the line, Question 1, Question 2, and so on. We ask a question, wait for an answer. After we do get an answer we insert the answer in the space provided for the answer.

Q. Just to expedite this, everything in this questionnaire, did you get that information from Mr. Erickson? A. Yes, sir.

Q. Now, how about this item—well, first of all, it says: "Applicant. Swedish." Where do you get that information? A. Mr. Erickson.

Q. Down here——

The Court: Now, wait a minute. Do you recall that?

The Witness: Evidently, Your Honor. Everything that I have asked him, the answers came from Mr. Erickson himself. [107] There would be no other person there to tell me whether he is married or anything about the applicant other than him, himself.

The Court: Well, actually remembering the incident, you don't recall this at all?

The Witness: Yes, it is so far back it is difficult to recall everything that was said. All I can go by is what my application has here to offer. Incidentally, you get into—you do things a certain

(Testimony of Val Gamber.)

way, we do them for years and years and just follow that particular pattern.

Now, as far as questions and answers are concerned, we ask him each question because it is a company policy that we do that. In this case I did the very same thing as I do. There is reasons for that, reasons that would be beneficial to me as well as to the company.

The Court: All right. All right, go ahead.

Mr. Walcom: Q. Mr. Gamber, you did, for instance, ask him for his driver's license number, did you not? A. Yes, sir, I did.

Q. And copied the number given you?

A. That is correct.

Q. You asked him the name of his previous insurance carrier, did you not? A. I did.

Q. And you got the number of that policy?

A. I did.

Q. Did you get the expiration date of it?

A. I did, it is listed 12-18-52, for 17 years.

Q. Had been insured with State Farm for 17 years. Now, in addition to that, you prepared——

The Court: Mr. Gamber, where did you get the number of that policy? Did you see the policy?

The Witness: Well, Your Honor, people carry identification cards issued to them by various insurance companies—we do the same—and as to whether it was written on a scrap of paper, whether it came from an identification card, I don't recall, but I must have gotten the number from some identifying certificate of some sort or I wouldn't have

(Testimony of Val Gamber.)

listed it on the application, I would have left it blank and let the company make their own investigation.

Mr. Walcom: Q. In addition to completing this questionnaire which I think at this time, if the Court please, I will ask be admitted as Defendant's exhibit next in order.

Mr. Friedman: On the questionnaire now?

Mr. Walcom: Questionnaire and the original of Plaintiff's Exhibit 3.

The Court: Isn't it already in evidence?

Mr. Walcom: The questionnaire is, Your Honor, but does that bear the questionnaire on the reverse?

Mr. Friedman: I would like to ask him some questions on [109] voir dire on this questionnaire, Your Honor. The only document received by the plaintiff here is the copy, but not what is on the back, and this is a copy of a document contained in their records that has writing on the back that the plaintiff has never even seen.

Mr. Walcom: The plaintiff, counsel, gets the copy, it is in triplicate. That is the copy they keep, the questionnaire, the client gets the conditions respecting binder and non-binder conditions of coverage.

Mr. Friedman: I understand that, but let me ask some questions, we have never seen it before today.

Mr. Walcom: Yes, you have, Counsel.

The Court: Let me see what you are offering now that isn't already in evidence?

(Testimony of Val Gamber.)

Mr. Friedman: It is the back of that that they have in their possession.

Mr. Walcom: Questionnaire, Your Honor.

Mr. Friedman: It is the third copy.

Mr. Walcom: On the reverse of that.

Mr. Friedman: It says at the bottom, "Branch Office Copy."

Mr. Walcom: That is the third white.

Mr. Friedman: It isn't the applicant's copy.

Mr. Walcom: It says applicant's copy.

Mr. Friedman: It can't be, this is the applicant's copy. [110] There is your branch office copy, see?

Mr. Walcom: That is right, that is the one going in.

Mr. Friedman: Yes, that is what I am objecting to.

The Court: Is this a fair statement of it, Mr. Gamber, that this back of this questionnaire is in your handwriting?

The Witness: Yes, sir, it is.

The Court: And after you asked the applicant, Mr. Erickson, certain questions, which you do not now recall, isn't that correct——

The Witness: That is correct.

The Court: ——you filled in the back of this questionnaire?

The Witness: No, sir, I filled in the questionnaire as I am asking the questions.

The Court: All right. But I say, you don't recall the particular questions, but the information was

(Testimony of Val Gamber.)

given you by Mr. Erickson and you wrote the answers on the back?

The Witness: That is correct.

The Court: The exact detail of what you asked him now, I take it, you don't remember?

The Witness: I would ask as the question itself states on the application, then I would insert the answer—have you had any accident or loss in the last so many years, and so on—you would enter in there the age of the youngest driver of the vehicle, who is the other driver, other [111] principal, and naturally he named his wife and age, and her driver's license and so on, insured by any other company. Naturally we, in this case it was State Farm, and what is the policy number, and when that policy expires. We ask all that information as we go down the list. Then if there is any remarks relating to the application we feel would be helpful, expedite the application, we make other remarks to the underwriting department, which is down here.

The Court: All right, this is filled out by you at the time you are talking about?

The Witness: That is correct.

Mr. Walcom: And then, Mr. Gamber, you got instructions on how to reach him at the address in Booneville, where you get off, the bus driver and the like, with which we are not concerned, and the car, the record of the—nature of the car and its condition? A. Yes.

Q. Then did you prepare a memorandum which

(Testimony of Val Gamber.)

is attached here and which I will show to counsel as well.

Mr. Friedman: Well,—

Mr. Walcom: Q. I will ask you whether or not you prepared this memorandum attached to this application, which is the fourth sheet attached to this application? A. That is my writing.

Q. And in that you wrote— [112]

Mr. Friedman: Now, just a moment, I must object to that document.

The Court: I don't see—

The Witness: That is an explanation to the underwriting department depicting the highlights of the application, why I thought it was an acceptable risk.

The Court: When is this made out?

The Witness: At the same time, before I sent my application in; that would be that evening.

The Court: After the customer left?

The Witness: After the customer would leave.

The Court: And you take the application that you have and you extract from that certain information?

The Witness: That is right.

The Court: That is in this information and you put it on down here? (Indicating)

The Witness: That is right.

The Court: That is done sometime later that evening?

The Witness: That is right.

The Court: Before you close?

(Testimony of Val Gamber.)

The Witness: That is correct, sir.

The Court: I don't believe that would be admissible, Counsel.

Mr. Walcom: Very well, Your Honor. Well, then, may I submit the first sheet with the questionnaire, if the Court [113] please?

Mr. Friedman: I want to enter an objection to the admission of that document on several grounds. One, on its face it states that it is branch office copy, it is not a copy delivered to the plaintiff here, plaintiff has never seen it to this day. It just says that third document, which Your Honor has seen fit to exclude from evidence, is purely for the purposes of their own office information and records.

The Court: I think it goes beyond that, counsel. I think it is admissible. In other words, this is done and introduced now for the purpose of refreshing his recollection. He has had a number of transactions, he said these were made out at the time and for the purposes of refreshing his recollection as to his conversation with Erickson.

Now, the other document is in a different category, that is the reason I excluded it, that was made while Erickson was not there, but at a later time.

Mr. Friedman: May I ask some questions on the document itself as to how he happened to complete it?

The Court: Which one?

Mr. Friedman: The one that is being offered that Your Honor feels may be admissible.

The Court: Yes, you may. [114]

(Testimony of Val Gamber.)

Voir Dire Examination

Mr. Friedman: Q. How many of these do you do a day?

A. Rather difficult to say. I can tell you approximately how many we do a week, more familiar,—

The Court: How many a week?

The Witness: I would say on the average of 14 to anywhere—18 a week.

Mr. Friedman: Q. As a matter of fact, at the time you were doing this, were there other people at the counter also securing insurance?

A. I don't recall that.

Q. And you don't know how you got the number of the policy, you say, that is on here?

A. No, I don't recall whether he had a slip of paper or how I got it.

Q. How long have you been doing this work?

A. Two and a half years, sir.

Mr. Friedman: I have no other questions, Your Honor.

The Court: All right.

Mr. Walcom: May we have that marked, if the Court pleases?

The Court: It may be marked.

(Whereupon questionnaire and original application were received in evidence and marked Defendant's Exhibit D.) [115]

Mr. Walcom: That is all. You may cross-examine, Counsel.

Mr. Friedman: I have no other questions, Your Honor.

(Testimony of Val Gamber.)

The Court: All right, you may be excused.

Mr. Walcom: Yes, you may step down, Mr. Gamber.

(Witness excused.)

Mr. Walcom: Call Mr. Wood.

FRED WOOD

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. Fred Wood?

A. Yes.

Q. What is your address, Mr. Wood?

A. The business address is 321 Middlefield Road, Menlo Park.

Q. What is your business or occupation?

A. Underwriting Manager for Allstate Insurance.

Q. How long have you been employed by Allstate Insurance Company?

A. Be five years November 14.

Q. And is it your province in your official capacity as Underwriting Manager to pass upon the desirability of risks? [116]

A. Yes.

Q. And your Company, does it have certain procedures in the procuring of applications for insurance?

A. Yes.

Q. Now, I will show you, Mr. Wood, an application form which is the Defendant's Exhibit D and

(Testimony of Fred Wood.)

ask you to look at it, sir. Do you recognize that form? A. Yes, I do.

Q. In the left-hand portion of that form, there is a question: Have you ever had insurance refused or cancelled, you or a member of your family, within the last two years. What is the purpose of putting that provision in that form, Mr. Wood?

A. To mainly weed out undesirable applicants.

Q. Is there any regulation permitting your solicitors or agents to bind coverage if those answers, rather, if those questions are answered affirmatively?

A. Yes, Allstate's agents cannot bind an application where the applicant has had a prior insurance cancellation or a license suspension, not allowed to.

Q. In your capacity as an underwriting manager, do you consider it material whether or not the applicant has had a cancellation of previous coverage extended to him or a refusal of coverage?

A. That and the license suspension probably are the two most [117] important questions on the application. It is usually a sure-fire thing that the applicant is undesirable if he has had a license suspension and prior cancellations from another company.

Q. You have told us that the Agent cannot bind coverage if those questions as to revocation, with which we are not concerned in this particular instance, but where that cancellation question is answered affirmatively, he cannot complete the binder

(Testimony of Fred Wood.)

portion? A. He cannot complete the binder.

Q. In other words, if he had those questions answered affirmatively, could he complete the non-binder portion?

A. Yes, if either question is answered on the "yes" side, the agent may submit the application to underwriting on a non-bound basis, no coverage is in force, allowing the underwriting department to make a full investigation to determine whether they would want to issue a policy or not.

Q. That is distinguished from the binder provision in that where the binder exists, the coverage takes place immediately, isn't that correct?

A. That is correct, it has an effective date on the binding portion.

Q. I see. Now, then, I have withdrawn that particular document from this underwriting file, but is it on the basis of that application that a policy was issued in this particular [118] case to Mr. Erickson? A. Yes, it was.

Q. And would you in fact have issued a policy to this gentleman if in truth and in fact there had been information in that application that he had insurance coverage cancelled or refused to him within two years preceding that application?

A. No.

Mr. Walcom: Thank you, sir. You may cross-examine.

Mr. Friedman: Your Honor, may I see the policy itself?

(Testimony of Fred Wood.)

Cross Examination

Mr. Friedman: Q. Mr. Wood, how long have you been an insurance underwriter?

A. Five years.

Q. And you are familiar with the practices of insurance companies and checking of application forms, questions and so forth?

A. I am familiar with Allstate's practice.

Q. Allstate's practice only?

A. Not only, but more familiar, naturally, being an employee.

Q. Don't you ever write letters of inquiry to other insurance companies relative to that man's insurance status with that particular company?

A. Yes, we do. [119]

Q. And having this particular number of a policy and the company, it would be, would have been very easy for you to have written a letter of inquiry or get them on the phone and find out the status of Mr. Erickson as far as his insurance went with Allstate?

A. There would be no necessity of it. Mr. Erickson stated he had not had a cancellation, never had an accident.

Q. All right. When do you have a cancellation under your policy?

A. Would you restate that?

Q. When do you have a cancellation—I will read the cancellation clause under your policy.

“Cancellation: The named insured may cancel

(Testimony of Fred Wood.)

this policy by mailing to Allstate written notice***” and so on, skip some of this.

“If Allstate cancels,”——

“Allstate may cancel this policy by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective.”

You are familiar with that clause, aren't you?

A. Yes.

Q. Now, assume you send that notice that I have described in this policy; when is there a cancellation as far as you [120] know under your terms of your own policy?

Mr. Walcom: Just a moment——

Mr. Friedman: Just a moment.

Mr. Friedman: Q. Is it the date you send the letter or the date set forth in the notice for the date of cancellation?

Mr. Walcom: Just a moment. If the Court please, I will submit it is incompetent, irrelevant and immaterial. It isn't Allstate's cancellations of the policy that was cancelled here, it is that of the State Farm Mutual.

Mr. Friedman: No cancellation here at all, Your Honor.

The Court: I think the objection may be sustained.

Mr. Friedman: Q. As a matter of fact, you don't have any cancellation under—Put it this way: You are an underwriter and familiar with these

(Testimony of Fred Wood.)

policies, aren't you? You know what cancellation means, don't you? A. Yes.

Q. You don't have a cancellation, do you, of any insurance policy until the date set for cancellation, do you?

A. Unless there is a breach of warranty, as in this case.

Q. Answer the question. Do you have a cancellation of a policy until the date set for cancellation?

A. If there isn't a breach of warranty and if we cancel the policy, we allow the insured ten days written notice, if we decide to terminate a risk because he is undesirable. [121]

Mr. Friedman: That isn't the question. I move to strike that, Your Honor.

The Court: I think it is all right, he has answered, and I don't believe that it is proper to ask him. This isn't cross-examination of what he went into as to certain phases of the Allstate policy. Now, that isn't the one we are talking about, it is the cancellation of the State Farm policy, isn't it?

Mr. Friedman: Yes, and the whole point of the case is there is no cancellation, and this man is supposed to be an expert on the subject, and I am asking him as an expert when he has, when he deems a policy to be cancelled. He says that they won't sell under this particular representation, that if there is a statement there is no cancellation, they won't sell. The question is, when is it cancelled.

The Court: Isn't that what the Court is supposed to decide?

(Testimony of Fred Wood.)

Mr. Friedman: I suppose so, yes. That's right. All right. I have no other questions.

The Court: That is all.

Mr. Walcom: You may step down, Mr. Wood. Is Mr. Gordon in the court room? Will you step up?

AL GORDON

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. Al Gordon?

A. Yes, sir.

Q. (Spelling): G-o-r-d-o-n?

A. Yes.

Q. Where do you live, Mr. Gordon?

A. 722-20th Avenue, San Francisco.

Q. What is your business or occupation?

A. Used car manager, Ansel Schloss.

Q. Were you in such employment, sir, in 1953, particularly in the month of March and thereafter?

A. Yes, sir.

Q. Been working there all along?

A. Yes, sir.

Q. Mr. Gordon, you are familiar, no doubt, with a car belonging to Mr. Oscar Erickson, which was in the Schloss establishment?

A. Yes.

Q. In 1953, were you, sir?

A. Yes, sir.

Q. Can you tell us what, if anything, has ever become of that [123] car?

(Testimony of Al Gordon.)

A. I sold that car two weeks ago.

The Court: What?

The Witness: I sold it two weeks ago, Your Honor.

Mr. Walcom: Sold it two weeks ago?

A. Oakland—the Oakland Automobile Auction.

Q. At the Oakland Automobile Auction?

A. Yes, sir.

Q. Could you tell us what amount was received for the car? A. \$493.00.

Q. Now, that car was sold to satisfy a garage-man's lien, sir, is that right? A. Yes, sir.

Q. Are you familiar with a lien on a car by dealers and the like? A. Yes, sir.

Q. You know that a lien for repairs is no good over the statutory \$100 unless authorized by the owner of the car, isn't that true?

A. Yes, sir.

Q. The repairs of this car were authorized by the owner, sir?

A. That part I couldn't tell you, sir.

Q. You wouldn't know?

A. That was out of my department. [124]

Q. That was out of your department?

A. Yes, sir.

Q. Do you know what the amount of repairs were? A. I believe around \$1100.

Q. Around \$1100? A. Right in there.

Q. And that was as of the time it was completed in 1953, is that correct? A. Yes, sir.

Mr. Walcom: May I see that first exhibit for

(Testimony of Al Gordon.)

identification, if the Court please, the Schloss repair bill?

Mr. Walcom: Q. I will show you, Mr. Gordon, a repair bill from Ansel J. Schloss, Mr. Oscar Erickson, Box 182, Booneville, California, Studebaker Model H, I guess that is, March 10, 1953, \$1117.55, is that correct? A. Right.

Q. Now, could you tell us, in your capacity as a used car sales manager, what, at the time, what was the value of this car, say, in February or in March of 1953, what was the going market value of a 1951 Model H Studebaker Sedan?

Mr. Friedman: I am going to object. We are speaking of a particular car. This man has never seen this car as of that time, not qualified to give his opinion as to its value at that time.

The Court: Oh, I think the objection goes to the weight, [125] if he can testify of his opinion of a car of that model and year, and I don't know whether you are talking about before or after the wreck, Counsel.

Mr. Walcom: No, I will qualify it. I think, Your Honor, that it should be the value of the car before the wreck, because in a wreck there will be a depreciation incident to the particular vehicle, so I will ask——

The Court: Are you familiar with this model number?

The Witness: Yes, Your Honor.

The Court: Studebaker, 1951. All right, go ahead.

Mr. Walcom: Q. And could you tell us what its

(Testimony of Al Gordon.)

value would be as of March of 1953, Mr. Gordon, if it hadn't been in this wreck?

A. If it hadn't been in the wreck?

Q. Yes.

A. I'd say in the neighborhood of around \$1100.

Q. About \$1100? A. Yes, sir.

The Court: What value is that, Mr. Gordon? Is that a retail value, wholesale value, or what is it?

The Witness: Your Honor, it is the retail value.

The Court: Retail value.

Mr. Walcom: Brought in off the lot.

The Court: The blue book value of the car at that time—do you have the blue book value of the car as of that time?

The Witness: The blue book, the wholesale or retail? [126]

The Court: You have heard of the blue book?

The Witness: Yes, sir.

The Court: Are you familiar with the blue book value of that car as of that time, both retail and wholesale value as shown by the blue book for that month?

The Witness: At that time I probably knew what it was; I haven't checked that far back.

The Court: You haven't looked it up recently?

The Witness: No, sir.

The Court: What?

The Witness: No, sir.

Mr. Walcom: Q. Your blue book is issued every quarter? A. Every two months.

Mr. Friedman: Your Honor,—

(Testimony of Al Gordon.)

The Court: They are available?

Mr. Friedman: I don't think this is admissible.

The Court: I believe this testimony is inadmissible. He states now he doesn't know. He has testified in his opinion about \$1100, but I was cross-examining on that opinion and I would like to know what the blue book shows.

Mr. Walcom: I am sure we could supply that to Your Honor. But those blue books change.

Mr. Walcom: Q. You, of course, see them currently for the period in which they are intended, is that correct? A. Yes. [127]

Mr. Walcom: I think that is all, Mr. Gordon.

You may cross-examine.

Cross Examination

Mr. Friedman: Q. Mr. Gordon, you say in your opinion if it hadn't been in a wreck it would be worth \$1100, is that right?

A. That is right.

Q. Your repair bill is \$1132? Is that correct?

A. Yes, sir.

Mr. Walcom: \$1117.

Mr. Friedman: Q. \$1117? A. \$1117.

Q. So your company charged more for repairing it than you say the car was worth, is that right? I don't get your answer; is that "yes"?

A. Yes, sir.

Q. As a matter of fact, this sale you are talking about, the car being sold at auction last week, is

(Testimony of Al Gordon.)

the third time this car has been sold to somebody, isn't that right, by Ansel Schloss?

A. Not that I know of.

Q. Or the second time, which is it?

A. Not that I know of, sir.

Q. It hasn't been sold before? [128]

A. I sold the car at Oakland—I sold the car at the Oakland Automobile Auction two weeks ago.

The Court: The Oakland Automobile Auction is what?

The Witness: It is a wholesale auction.

The Court: It is a wholesale auction for dealers?

The Witness: For dealers only.

The Court: For dealers only. Okay.

Mr. Friedman: Q. As a matter of fact, this car has been sold at least twice, or possibly three times, and returned by the buyer each time because they didn't want it because the frame was so bent that they couldn't use it, isn't that true?

A. Not that I know of, sir.

Q. Did you see this lien notice that was sent that the car would be sold in January of this year, of 1954?

Mr. Friedman: Where is that lien notice?

The Court: I am not very much impressed by the fact it was sold a couple of weeks ago for \$400. Counsel. It doesn't give me much idea of what it was worth in March of 1953.

Mr. Friedman: Just a moment, Your Honor.

The Court: All right.

Mr. Friedman: Q. Your Company does quite

(Testimony of Al Gordon.)

a bit of repair work for cars sent by Allstate, isn't that true?

A. I believe they do, sir. I am out of that department, and [129] I don't know.

Q. I understand. Therefore, when you testify here, called by the attorney for Allstate, you want to help Allstate, don't you?

Mr. Walcom: Now, just a moment.

The Court: That goes to the weight, Counsel.

The Witness: No, sir, I am not trying to help anybody.

Mr. Friedman: Q. Do you know whether this car was sold pursuant to this notice dated the 11th day of December, 1953, sent to Mr. Erickson, indicating that it would be sold on the 6th day of January, 1954 at ten o'clock a.m., at 49 South Van Ness Avenue? Do you know it was sold pursuant to that notice or not? A. No.

Q. You don't know that?

A. No, sir, it was not sold.

Q. It wasn't sold?

A. It was sold on our lot by auction.

Q. Only two weeks ago?

A. No, when it was first sold for the lien.

Q. When was that?

A. That, sir,—I haven't got the date, we have it in our office.

Q. Somebody bought it at that time, did they?

A. Yes, we bought it—I bought it. [130]

Q. You bought it? Did you sell it again?

A. I sold it two weeks ago.

(Testimony of Al Gordon.)

Q. That is the first time since? A. Yes.

Q. You couldn't sell it up to that date, the date you——

A. Well, you could, but tried to get too much money for it.

Q. What were you trying to get for it?

A. \$1095.

Q. Up until two weeks ago? A. Yes.

Mr. Friedman: Thank you.

Mr. Walcom: That is all, Mr. Gordon. You may step down, sir.

(Witness excused.)

Mr. Walcom: At this time, if the Court please, I would like to have this file of Ansel Schloss, heretofore marked for identification purposes, to be an exhibit on behalf of the defendant.

The Court: What is that?

Mr. Walcom: It is the file of the repair bill, if the Court please, and there is a letter here of Francis T. Walsh who represents, apparently—yes, he represents Ansel Schloss.

Mr. Friedman: An awful lot of stuff.

The Court: What is the purpose of it, Counsel?

Mr. Walcom: Well, some of it for this purpose. Your Honor, here is one letter of April 2, 1953, referring to the order for the repairs given by Mr. Erickson from Allstate Insurance Company, and two other documents here are copies of correspondence to Mr. Erickson.

The Court: I am not going to admit those, deny it on that basis, Counsel.

Mr. Walcom: Very well, Your Honor.

Call Mr. Daly.

WILLIAM DALY

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: William Daly, (spelling) D-a-l-y.

Direct Examination

Mr. Walcom: Q. Where do you reside, Mr. Daly? A. Redwood City.

Q. What is your business or occupation?

A. Claims Manager for the San Francisco Office of Allstate Insurance Company.

Q. Was that your employment, Mr. Daly, in February and March of 1953? A. It was.

Q. Were you in charge of the handling of a claim for collision and for medical payments presented by your insured, a Mr. Oscar Erickson?

A. I was.

Q. Could you tell us, first of all, Mr. Daly, approximately when it was you received notice of any loss suffered by Mr. Erickson?

A. May I look at the file?

Q. Certainly. You can see the file. Make it available to Mr. Friedman, too.

A. I would say that the first notice came to one of our adjusters, Mr. Pond when he was in Santa

(Testimony of William Daly.)

Rosa, and I would assume it is a Tuesday, that is our normal day for going to Santa Rosa.

Q. That was on what date?

A. I would say it was probably—I may be wrong—December the 17, because the accident happened on the 15th, which I believe was a Sunday.

Q. February 15th? A. February 15th.

Q. February 17th, was it?

A. February 17th; I am sorry.

Q. What was next done, Mr. Daly; to whom was it referred for handling?

A. Well, Mr. Pond was in Santa Rosa, and since the accident [133] happened a distance beyond which we would normally handle claims ourselves, we assigned it to an independent adjuster by the name of Reed & Corippo in Ukiah for handling. Mr. Pond phoned Reed & Corippo.

Q. Does the file reveal when they were able to get to this automobile?

A. We have a letter dated February 20 in the file from Reed & Corippo, saying this loss was reported to the office February 17th, 1953, by your Mr. Pond from Santa Rosa.

Q. Do you know whether or not Mr. Corippo was ever personally able to talk to Mr. Erickson?

A. That I don't know from the file. I don't know if he was or not.

Q. The file doesn't reveal that?

A. That's right.

Q. Now, this car was removed from the vicinity of the accident?

(Testimony of William Daly.)

A. Our file would indicate it was, I think the Burke Motors in Fort Bragg.

Q. Was it removed from that place?

A. It was removed from Burke Motors by the Civic Center Towing Service to Ansel Schloss.

Q. On what date? A. March 2, 1953.

Q. All right. Now, at the time which adjuster, if any, in [134] San Francisco, was handling the actual transactions regarding the car?

A. Mr. Pond was the material damage adjuster who was to adjust the physical damage portion of the loss.

Q. Mr. Daly, is it your custom to make any investigation concerning the warranties, or the warranties made by an insured, after this insured has an accident and makes a claim?

A. It is company policy that when we have a total aggregate exposure of \$750 that we investigate the warranties on the insured's application.

Q. Now, was that done in this case, sir?

A. It was.

Q. Could you tell us on what date that was first undertaken?

A. On March 3. There is a notification in the file here that we sent a letter to the Department of Motor Vehicles in Sacramento requesting a check on the operator's license of Birdella Erickson, and on the same date we sent one of our own forms, a CL9 to our own underwriting department in Menlo Park which says to please check the file for the following information, the operator's license of

(Testimony of William Daly.)

Oscar Erickson, and the prior insurance carrier.

Mr. Walcom: Now, Your Honor, we will recall Mr. Wood to show whether that was received.

Mr. Walcom: Q. You requested the prior insurance carrier check be made through your Menlo Park underwriting headquarters. What information did you receive concerning that inquiry?

The Court: Counsel, aren't we taking a lot of time about this? They made an investigation. As a result of the investigation they wrote the letter of March 24.

Mr. Walcom: That is correct, Your Honor. I merely wanted to take Your Honor through the manner in which they learned there had been a cancellation where he said previously they had not.

The Court: Counsel, I used to represent some insurance companies, I have some idea of their procedure. They made an investigation. As a result of that they wrote the letter of March 24th. Isn't that the answer?

Mr. Walcom: That's it in a nutshell.

The Court: Isn't that right?

The Witness: That is right.

Mr. Walcom: Q. Subsequently in April, after you had first disclaimed in March, reserved your rights in March, then in April you disclaimed?

A. That is correct.

Mr. Walcom: Thank you.

That is all I have to say, Your Honor.

Mr. Friedman: I have nothing to ask. [136]

The Court: That is all. Thank you.

(Testimony of William Daly.)

Mr. Walcom: You may step down.

(Witness excused.)

Mr. Walcom: Is Mr. Pond here? Call Mr. William Pond.

WILLIAM POND

called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. William Pond?

A. That is correct.

Q. That is (spelling) P-o-n-d?

A. (Spelling) P-o-n-d.

Q. Where do you live, Mr. Pond?

A. Presently in Pedro Valley.

Q. What is your business or occupation?

A. I am material damage adjuster for Allstate Insurance Company.

Q. Were you so employed, Mr. Pond, in March of 1953?

A. I was.

Q. And in your capacity as material damage adjuster, so we'll all know what that term means, you investigate collision losses, is that correct, and the like?

A. That is correct. [137]

Q. In other words, you are not the type of investigator who goes out and get statements from witnesses in personal injury cases and the like, you handle damage to automobiles, is that correct?

A. That's right.

Q. You handle them in the sense that you make

(Testimony of William Pond.)

an estimate of the actual repairs to be made, is that correct? A. That is right.

Q. Now, calling your attention to a Studebaker owned by an Oscar Erickson at Ansel Schloss on or about that time, did you look at that car and make an estimate? A. I did.

Q. That car at Ansel Schloss, did you ever authorize repairs to be made on that car to be charged to Allstate? A. I lost you there.

Q. I say, did you ever authorize Ansel Schloss to repair that car and send the bill to Allstate?

A. We never authorized repairs.

Q. Did you make an estimate?

A. I did make an estimate.

Q. You did make an estimate of how much it would cost to repair, is that correct?

A. That is correct.

Q. And with whom did you deal up there? Was it Mr. Aiello? Apparently he was there. Do you recall who it [138] was?

A. The service manager at that time was Gordon Perry.

Q. Gordon Perry. In other words, you might tell the Court, because I am not quite certain just what your activities are, will you just tell us what you did do as far as Ansel Schloss and that car is concerned?

A. Well, after I was notified the car had been delivered to Ansel Schloss by the Civic Center Transport Service, I went down there and identified the vehicle as being a vehicle that was in the

(Testimony of William Pond.)

policy, by motor number and description, and then proceeded to make an estimate of the damage that had been suffered as the result of this upset.

Q. And was anything else done in the way of— did you tell Schloss that this was an Allstate loss, that you would pay for it, or did you have any conversation or anything like that with Schloss in regard to who should pay for that car or who should authorize repairs? A. No, sir.

Mr. Walcom: Thank you, sir, that is all.

The Court: Do you have any dates as to when this car was turned in to Ansel Schloss, Mr. Pond?

The Witness: I wouldn't have them. I believe this gentleman standing here with the papers might, he has a copy of my estimate that—

Mr. Walcom: It was taken there, Mr. Daly testified, on [139] March 2, if the Court pleases, and I think we can stipulate on that.

The Court: On March 2nd when you took it there, did you arrange to have it go to Ansel Schloss?

The Witness: I arranged for the transportation.

The Court: Yes. You told them to make an estimate of the repairs?

The Witness: No, I made my own estimate.

The Court: You made your own estimate. Ansel Schloss does business with Allstate in connection with repairing cars?

The Witness: They have, yes, sir.

The Court: And March 2nd, the time you had the car at Ansel Schloss and you made the esti-

(Testimony of William Pond.)

mate, that information that you had at that time was that it was a loss to be paid for by Allstate?

The Witness: That is right, Your Honor.

The Court: And it wasn't until later, sometime three weeks later, that you learned that there was a disclaimer of liability by the Allstate Company?

The Witness: That is right, Your Honor.

Mr. Walcom: I have no other questions.

Mr. Friedman: I have no questions.

Mr. Walcom: If the Court pleases, that is the defendant's evidence.

Mr. Friedman: I may have a little rebuttal, Your Honor.

OSCAR F. ERICKSON

recalled as a witness on his own behalf in rebuttal, being previously duly sworn, resumed the stand and testified further as follows:

The Court: I will say to both parties that I am not satisfied with the testimony on either side as to the value of this automobile. I have some ideas as to what testimony could be produced. I don't think either side has produced the best testimony as to the value of this car.

Now, it is pretty easy to get——

Mr. Walcom: Your Honor, may I suggest this——

The Court: You can get it by a five minute phone call to any lending agency that has a blue book. They could give you the blue book, the retail and wholesale, and that has some relation to its market value.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: I purposely didn't bring the blue book because I thought it would be hearsay.

The Court: I think it has some relation to value. I don't say that that is a bible you have to follow definitely, but it does give some idea as to value.

Mr. Friedman: That is true, no question about it.

Mr. Walcom: We can procure that. I will undertake to get a blue book, if the Court please, for that period. [141]

The Court: If counsel between them would agree, just submit in a letter, for this particular model on the date of this accident, what the retail value was as shown by the blue book, the wholesale value as shown by the blue book. I think that gives some indication of value. I know there are times when the market is depressed and blue book values are not entirely accurate, but they do give some indication.

Mr. Friedman: I agree with the Court, it does give some indication of the value.

The Court: Here you have on one side the testimony of the plaintiff, who has a right to testify as to the value of his car, but who has no great experience, we will say, in checking the value of the car.

On the other side we have the testimony of somebody who claims he didn't look at the blue book and trying to remember what it was a year and a half ago.

Mr. Walcom: I will produce it for Your Honor.

The Court: All right, go ahead.

Mr. Friedman: The questionnaire is what I want.

(Testimony of Oscar F. Erickson.)

The Court: The questionnaire?

Mr. Friedman: The questionnaire, Your Honor. Here it is.

Direct Examination

Mr. Friedman: Q. Mr. Erickson, the Defendant's Exhibit D in evidence is a questionnaire from—and on it in reference [142] to a question, purportedly an answer given by you as to—I don't know what it is in answer to, "Applicant Swedish". Did you tell that man you were Swedish?

A. Not that I ever know about.

Q. Where were you born, Mr. Erickson?

A. I was born in the United States.

Q. Now, in reference to the number of the policy that is listed down here, 528848-B405, do you know how he got that number?

A. No, I don't.

The Court: Did you have an identification card with your policy?

The Witness: That—the identification card has no number on it, it just says the State Farm on it with—has no number, my number is on the policy.

The Court: You are sure of that?

The Witness: Yes, sir.

Mr. Friedman: Did you tell him you had an expiration date of December 18, the following day, on your Allstate Insurance?

Q. Will you repeat that?

Q. Did you tell this man at Sears & Roebuck that the expiration of your insurance was December 18, 1952, on your *Allstate* Insurance?

(Testimony of Oscar F. Erickson.)

A. No, sir. [143]

The Court: What did you tell him about that, do you recall?

The Witness: I didn't tell him that cancellation—I told him the cancellation date was the 27th. I did not say the cancellation date, I said it expired the 27th, is what I mean to say.

The Court: Didn't you tell him you wanted this insurance to be in effect right now?

A. That is right, the only way we could go to Mexico was—wanted a policy to take us to Mexico, our policy wouldn't take us there.

Mr. Friedman: Q. You didn't say "My other policy with *Allstate* expires tomorrow or today"?

A. No, sir.

Q. You didn't make that statement to him?

A. No, sir.

Q. Incidentally, was anybody else at the counter at that time?

A. Yes, there was another couple there right with us, writing almost the same time he wrote ours.

Q. Were they asking, were they being asked any questions by this man at the same time?

A. Yes, sir.

Q. Was there anybody else before you or behind you? A. That I don't recall. [144]

Mr. Friedman: I see. That is all.

Mr. Walcom: I have no questions.

The Court: That is all.

(Witness excused.)

Mr. Friedman: That is the extent of the plaintiff's rebuttal, Your Honor.

Mr. Walcom: Now, if the Court pleases, I would like to renew my motion. I don't know if Your Honor has had an opportunity to look at the case of *Allstate Insurance Company vs. Moldenhauer*.

The Court: No, I have not.

Mr. Walcom: It appears, if the Court pleases, in 193 Fed 2d, 663. That is a 1952 case arising in the Seventh Circuit.

Now, if the Court pleases, the testimony, without contradiction, is that when that application was completed by Mr. Erickson, he did not disclose that he had a notice of cancellation and/or a refusal to extend insurance coverage in that letter of December 15 from the State Farm Insurance Company, he admits that.

The testimony——

The Court: I don't want to stop you, Counsel, but I think we can limit this. I am fairly familiar with what the testimony is today, but there are certain points that I want to have some help on.

Mr. Walcom: What I am talking about particularly, Your [145] Honor, is that bearing that in mind, you have the testimony of Mr. Gordon and particularly that of Mr. Wood of the materiality of the information sought to be adduced in those questions. And it is uncontradicted, if the Court pleases, that it is material in their determination of whether or not a policy should issue to the applicant.

Now Counsel has brought up the issue here which

I think has been resolved in the Moldenhauer case in that he attempts to distinguish between a cancellation which is to take place ten days after the notice or thereabouts, as opposed to maybe the layman's idea of cancellation right here and now.

In the Moldenhauer case, in that action, and I quote from the Court's opinion on Page 664, this is a declaratory relief action in which Allstate was the plaintiff, Moldenhauer the defendant.

"* * * prior to the issuance of plaintiff's policy, Moldenhauer had been insured with the State Farm Mutual Insurance Company, which Company had, before plaintiff issued its policy, notified Moldenhauer that it was cancelling his insurance, * * * because of the number of small accidents in which he had been involved. Thus it clearly appears that Moldenhauer's declaration that no insurer had ever cancelled any automobile insurance which had been issued to him was false. [146] Based on these findings, the court concluded that the policy was null and void because Moldenhauer had failed to disclose material facts which increased the risk."

Now, we have not only that case, but Your Honor will doubtless be familiar with the California case of Allstate versus Miller, which is 96 Cal App 2d, Page 778. And in that case the representation was that he had not had a driver's license suspended. I mention this case, if Your Honor please, because it is the exact policy form that is involved, the same binder, the same story or pattern that follows, and the Court in that case held that in view of the testimony of the underwriter that this was a very ma-

terial matter that the question of the desirability of the risk depended upon the driver's history was most material in determining whether the policy should issue, that the company had a right to declare the policy void under the count of the breach of warranty.

Now, if the Court pleases, it is not a matter of intent in these things even, as the Courts have held, and I could quote you here—I am going to give you a citation in a moment—if the insurer is misled by statements that were made, it is immaterial whether the insured's omission to state the true facts were intentional or unintentional. That is the case of *Mirich vs. Underwriters at Lloyd's London*, [147] 64 Cal. App 2d, 522.

Our Insurance Code, in Chapter III, commencing with Section 330 of the Insurance Code, the effect of concealment and the neglect to communicate that which a party knows, and what to communicate to another which will affect the desirability of a risk, and that is concealment.

And it goes on to state further that concealment, whether intentional or unintentional, entitles the injured party to rescind.

Now, what is to be construed as material is defined by statute in Section 334:

“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, informing his estimate of the disadvantages of the proposed contract, or in making his inquiries.”

Now, in view of those sections, if the Court pleases, it must be most clear and uncontradicted that Allstate Insurance Company would not have allowed Mr. Gamber to bind that coverage, it would not have issued the policy had it known that these representations—that he had been refused further coverage or that there had been a cancellation. Of course not. This policy would not have been issued. As Mr. Gamber explains, he might have written a non-binder, [148] merely an application which would require the underwriting department to investigate and then determine if it wanted to cover the man; or, as he said, if he couldn't get coverage, go as an assigned risk.

So I don't think, if the Court pleases, under that Moldenhauer case particularly, which is most like this in every respect, that there is any question. A man admits that he concealed that information. He knew it. He talked to his agent. He knew of his history, and why he was being cancelled. And it seems to me a distinction without a difference to try and say just because he got the notice he was being cancelled, although the effective date was some ten or twelve days hence, that he is entitled to have a mental reservation and say he had never been cancelled. The fact is that was a matter which should have been communicated, because it would affect, as 334 says, the conduct of Allstate Insurance Company as to whether or not it was to issue that policy.

Now, further than that, if the Court pleases, you have the very terms of the policy itself, you have

that application which says subject to the terms of the policy, and particularly the reverse portion of that form which the gentleman obtained when he signed his application, namely, that—that section says:

“Any insurance bound hereunder shall otherwise [149] be subject in all respects to the terms and conditions of the regular policy form of the company at present in use and to the statements in this application.”

And again that is reiterated in the insuring clause of the policy. It is reiterated again in the supplement page where again the question is asked, or at least is declared that during the last two years there has not been a refusal or cancellation. And again in the conditions, No. 1:

“By acceptance of this policy the named insured agrees that the Declarations on the supplement page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents.”

Now, I say to this Court that there is not any contradiction. I would be happy if Your Honor had any questions that you might wish to present to me.

I can't see that there is anything here other than a clear demonstration of a breach of warranty, a withholding of information which caused Allstate to issue that policy when it never would have been issued had the truth been before it, and it is not concealment of any minor thing, it [150] is concealment of a most material thing which occurs to an

underwriter, as we learned from Mr. Wood, namely, the desirability of the risk. I submit there is no evidence here which overcomes that demonstration of materiality and concealment by the plaintiff which caused the preparation of this policy. It was fraud from the beginning because there was never a contract, never a meeting of the minds. This policy could never take effect because there had been a misrepresentation at its inception. I submit to Your Honor that is the State rule in the California case, and the Moldenhauer case is the Federal rule on that, and that Your Honor should grant us a judgment or a dismissal of this action.

The Court: What about the question, while you are there, the question of jurisdiction. Here is the question that arises in my mind. Let us assume that the claim, as it does in this case, asks for a figure in excess of the \$3,000. The proof to the Court might justify an amount less than \$3,000. That is, assuming all other things in favor of the plaintiff for the moment. The mere fact that the proof comes to less than \$3,000; does that bar it for lack of jurisdiction?

Mr. Walcom: My understanding of the rule, Your Honor, is that it is a question of good faith, that if I came in before Your Honor alleging a personal injury, let us say, [151] and Your Honor awarded me \$2950, you would not, in that instance, if you were satisfied I sought this sum in good faith, you would not deprive me of the jurisdiction of the Court. That is my understanding of the rule.

Am I correct, Counsel?

Mr. Friedman: I think that is approximately right.

Mr. Walcom: But I submit in this case we raised this question of jurisdiction from the very inception by motion to dismiss immediately on the filing of the complaint because of the liquidated amount of the damages, easily demonstratable and he knew what the loss or bill was at the very time the accident occurred, he knew what those bills were thereafter. There is one here that comes even two or three months after the accident, so they were readily demonstratable and known to him.

However, I think, if the Court pleases, my further understanding of the rule is that in the event Your Honor should find that the defendant should prevail, that I believe Your Honor has the right to accept the prayer in the complaint for the purpose of rendering that judgment. I am frank to confess I do not practice much in Federal courts, if the Court please, and I do not profess to be an expert on them.

The Court: All right.

Mr. Friedman: On the question of jurisdiction, because counsel had raised that in the previous motion, I did do a [152] little research, and he has substantially stated the rule, that is true. If the complaint on its face sets forth a cause of action which jurisdictionally as to amount is sufficient to come within the province of this Court and it appears to be generally in good faith, even though the evidence demonstrates a lesser amount, the Court may give

a judgment for a lesser amount and will have jurisdiction.

Moreover, the cases also hold, if the Court finds on the jurisdictional matter alone as to amount, that that is the only reason for dismissing the case, not to the issue in connection with the question whether or not there was a cancellation, a misrepresentation as to cancellation, the Court then should state that it is those grounds, that it is dismissing on that basis, because it doesn't, there isn't sufficient amount jurisdictionally in the complaint. The cases that hold that are *Scott vs. Penn Railroad Company*, 8 FRD 548, and *Topping vs. Fry*, Seventh Circuit, 147 Fed 2d, 715. That case is lack of jurisdiction and dismissal by the Court on that ground and not on the merits. The Court should indicate that is the reason, on the ground of insufficient amount. The courts have held an amendment of a complaint permissible instead of dismissal. If there is any way of saving the action, the Court will, on amounts that the plaintiff can show the Court that they really have that amount, the Court may permit an amendment to the [153] complaint, which is the foundation for the Court's jurisdiction, rather than the evidence which will be produced, sometimes which may not be equal to the amount claimed. The case that will support that position——

The Court: I didn't understand you, Counsel.

Mr. Friedman: The point there is, Your Honor, as I did in this case, I moved to amend the complaint when we started and asked the Court's per-

mission to set forth answers to the interrogatories increasing the amount of the damage.

The cases have held that where it appears the complaint may be defective as to jurisdictional amount that the Court will permit, if possible, to save the action. In other words, the policy is to save the action on the grounds of jurisdictional amount, if it is possible, rather than to throw it out of the Court.

The Court: Your complaint here states an amount in excess.

Mr. Friedman: It does, and the complaint is the foundation.

The Court: There wasn't any necessity to amend the complaint.

Mr. Friedman: I stated the value to be \$2,000, and I amended it to \$2300. That is the purpose we have amended it, and then also in the answer to interrogatories. We didn't [154] have the bill, we didn't have the amount claimed as damages for the \$700, nurse's bill, and I asked the Court's permission to include that as an answer to the interrogatories, which would come within the \$2,000——

The Court: What was the advantage of the Federal court in this case?

Mr. Friedman: What was it, Your Honor?

The Court: What was the motive for being in the Federal Court in this case?

Mr. Friedman: In this case—As a matter of fact, it hasn't been revealed to the Court, Allstate brought an action for declaratory relief in Santa Rosa in the State court, and I had that action dis-

missed on the ground that wasn't the proper action to bring, that I have decisions of the Court up here, don't want to burden the Court, but that the proper action was an action by the insured against Allstate and that they should raise that as a defense, and that Court up there found that to be—I researched the law pretty carefully on that, and I have a decision here, if the Court will bear with me a moment, bring out the decision. In the State court, Allstate's action for declaratory relief in Santa Rosa—and that is why I brought it to San Francisco, I brought it to San Francisco for my own personal convenience, in the Federal District Court——

The Court: Why not in the State Court? [155]

Mr. Friedman: Well, I think I might have had to go back to Santa Rosa. So I believe, in good faith, that the amounts at that time were jurisdictionally correct, it was not brought in bad faith, brought in good faith, but I wanted it in this Court because it would have been, as I researched the law that follows, I might have to go back to Santa Rosa and bring an action against Allstate in Santa Rosa.

The Court: Now, another question, on the cancellation question do you have any authorities?

Mr. Friedman: At this point I don't. In view of Counsel's authorities, I would like the opportunity to read them myself, submit it as a brief, if the Court will permit me to.

The Court: You don't have to have any argument, just submit the point and the cases.

Mr. Friedman: May I say this in passing, it properly is not in these cases, when we think of the

position of Allstate in this type of case, they are really in a very enviable spot. They write insurance rapidly, I will say almost carelessly, accept applications, numerous applications, take a man's premium or countless premiums, and if there is no accident, to pocket it. As soon as there is an accident, then they make a very careful survey and search an underwriting investigation to find out every possible way they can to defeat payment.

One of the witnesses testified he is an underwriting man working for Allstate, working for them for five years. He has the number of the policy of Allstate (sic), he has the Allstate Insurance Company (sic) involved, it is revealed to them. Not a single attempt is made to find out a thing about coverage or lack of coverage or whether Mr. Erickson has been thrown out, but when there is an accident on February 15, three or four months later—they don't do anything about it, his car is taken down to a garage in San Francisco on March 3, that is almost 18 days after the accident, brought into a garage in San Francisco, and they don't disclaim liability until sometime—the letter is there—don't disclaim it. March 14th is the first time they express a doubt to Mr. Erickson as to whether they can give him coverage. I say they are not coming into Court with completely clean hands. That is not real insurance. Protect themselves—and if these authorities really contend what Mr. Walcom says they do, how about the provision in the letter which says we will cancel, why don't they put in, it would be very easy to put in those representations,

say, "Have you ever had a notice or intention to cancel, or a cancellation or a refusal to take insurance." Now, they say, ever had a cancellation. They have great experts writing these policies, selling them all over the United States. They have all the cards in their hands. Protect themselves. It would be very easy. They make no [157] attempt to. They only pump the insured, when he has a claim, the only time they figure it out, say they have been defrauded.

I don't think they should be permitted to get away with that. If they really wanted the Courts to protect them and have the policies and write the policies, they could very easily insert that clause in their policy. And I feel they should bear the burden.

The Court: How long do you want to present these?

Mr. Friedman: About ten days, Your Honor.

Mr. Walcom: We could do it in less than ten days.

Mr. Friedman: Well, if Your Honor wants it faster, we can do it faster.

The Court: Well, a week or ten days, wouldn't make much difference between Friday and Monday. Make it ten days. That will be the 25th. And at the same time, will there be a letter in there indicating what the blue book value of the car was?

Mr. Friedman: As of that year?

The Court: As of that time.

Mr. Walcom: Your Honor, not to imperil my lawsuit, I happened to think, perhaps we can stipulate to this without reopening the case, will you stip-

ulate that Mr. Erickson had his premium returned to him, whether or not he cashed the check, but it was sent to him?

Mr. Friedman: In view of the stipulation, he turned it [158] back to the company through me.

Mr. Walcom: Will you stipulate that the premium was returned?

Mr. Friedman: Attempted to return it and we sent it back, yes.

The Court: But it didn't come at the time, had not been received at the time of December 17th?

Mr. Friedman: Wait a minute.

Mr. Walcom: Speaking of the Allstate premium; you see, he paid his premium.

The Court: The \$132.00.

Mr. Walcom: That is right, that was returned.

Mr. Friedman: That was an attempt, and we sent it back.

The Court: All right. That will be in ten days, then.

Mr. Walcom: May I have five days to reply to counsel?

Mr. Friedman: I am giving mine first?

Mr. Walcom: You asked leave, did you not?

Mr. Friedman: All right, very well.

The Clerk: November 5 for submission. [159]

[Endorsed]: Filed March 29, 1955.

[Endorsed]: No. 14708. United States Court of Appeals for the Ninth Circuit. Allstate Insurance Company, a corporation, Appellant, vs. Oscar F. Erickson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14708

ALLSTATE INSURANCE COMPANY, a cor-
poration, Appellant,
vs.

OSCAR F. ERICKSON, Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely
in this appeal are as follows:

I.

That appellee had been cancelled as a policy-

holder of the State Farm Mutual Insurance Company before he applied to Allstate Insurance Company for a policy.

II.

That the misrepresentation by appellee in failing to disclose that his previous insurance policy had been cancelled when he applied to Allstate Insurance Company for a new policy was a breach of warranty, which prevented the policy issued by Allstate Insurance Company from attaching to the risk.

III.

That when appellee concealed from Allstate Insurance Company that State Farm Mutual Insurance Company had previously cancelled his policy, his concealment of this material fact was a breach of warranty which entitled Allstate Insurance Company to rescind the policy which it then issued in ignorance of the fact of the concealment by appellee.

IV.

That the failure of appellee to disclose that his previous policy was cancelled by State Farm Mutual Insurance Company was a breach of warranty which misled Allstate Insurance Company into issuing a policy it would not have issued if there had been no concealment and the policy issued in reliance on facts which were not true because of the

appellee's concealment and misrepresentation caused this policy, which was issued, to be void.

Dated: April 4, 1955.

Respectfully submitted,

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed April 4, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant hereby adopts and incorporates by reference, the designation of record heretofore filed in the United States District Court for the Northern District of California, Southern Division, as its designation of record in the appeal of this cause.

Dated: April 4, 1955.

HEALY & WALCOM,
/s/ LEO J. WALCOM
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed April 4, 1955. Paul P. O'Brien,
Clerk.

No. 14,708

**United States Court of Appeals
For the Ninth Circuit**

ALLSTATE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

OSCAR F. ERICKSON,

Appellee.

APPELLANT'S OPENING BRIEF.

HEALY AND WALCOM,
68 Post Street, San Francisco 4, California,
Attorneys for Appellant.

FILED

MAY 18 1955

PAUL P. O'BRIEN, CLERK

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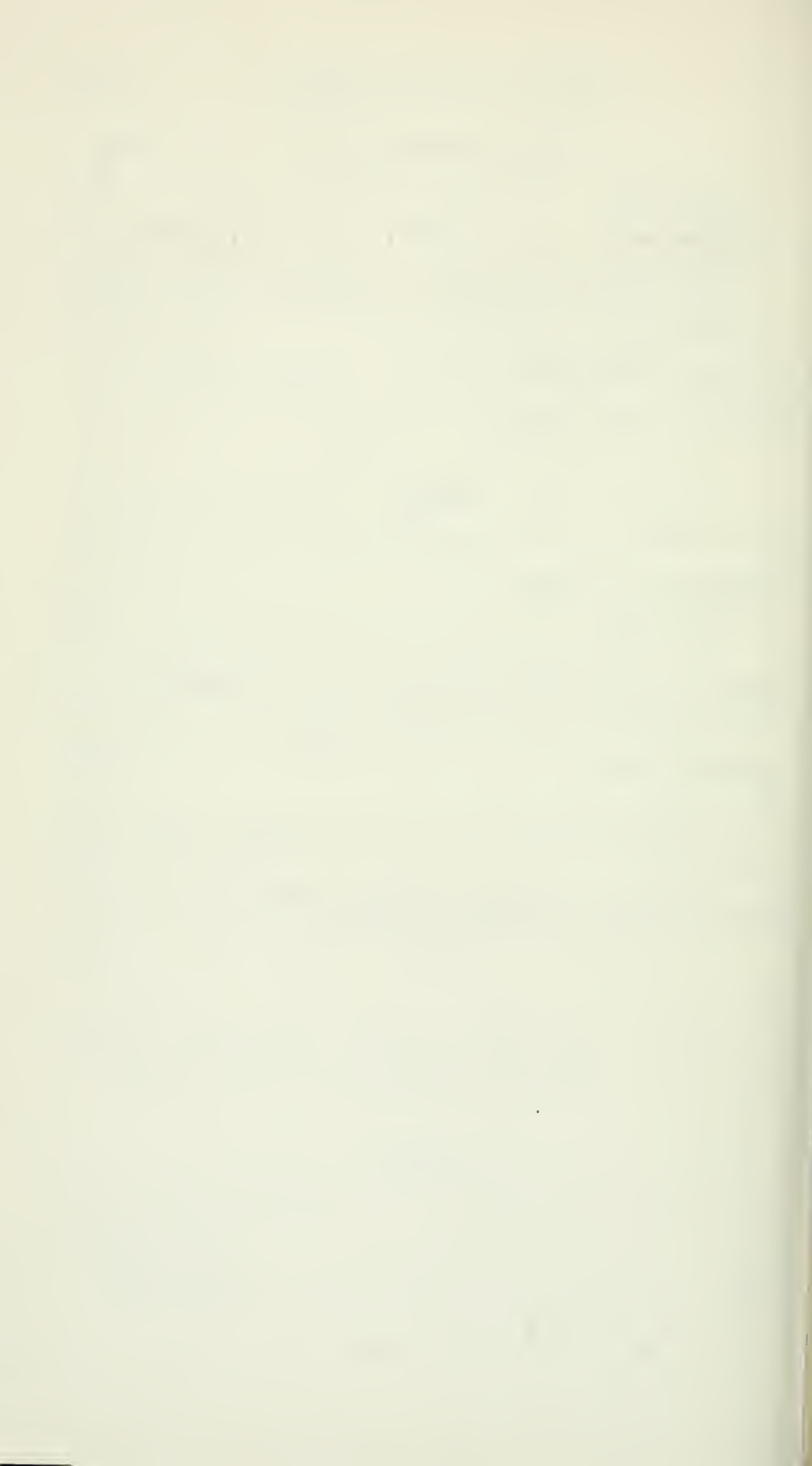
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United States Court of Appeals For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, a Corporation,	<i>Appellant,</i>
vs.	
OSCAR F. ERICKSON,	<i>Appellee.</i>

APPELLANT'S OPENING BRIEF.

I. STATEMENT OF THE PLEADINGS AND FACTS DIS- CLOSING BASIS OF COURT'S JURISDICTION.

This is an appeal from a judgment entered in the United States District Court, Northern District of California, Southern Division, on the 7th day of January, 1955, in favor of the appellee Erickson after trial by the Court sitting without a jury of an action to recover proceeds under an automobile insurance policy.

The District Court had jurisdiction of the cause under the provisions of Title 28 U.S.C.A., Sec. 1332-2.

The United States Court of Appeals for the Ninth Circuit has jurisdiction upon appeal to review the

judgment of the District Court below under the provisions of Title 28 U.S.C.A., Sec. 1291.

II. STATEMENT OF THE CASE.

The printed record on appeal consists of the pleadings, and formal documents (pages 3-45); the opening statements of counsel (pages 46-56); stipulations, reception of documents into evidence, and testimony of all witnesses (pages 57-169); argument of counsel. (pages 170-182.)

Appellant Allstate Insurance Company is an insurance company organized under the laws of the State of Illinois and authorized to conduct insurance business in the State of California.

On December 17, 1952, at 6:05 P.M., appellee applied to appellant for a policy of automobile insurance, signing an application for the issuance of the policy. (Plaintiff's Exhibit No. 3. The original signature appears on Defendant's Exhibit No. "D".) This application contained a question: "Has any insurer ever cancelled any automobile insurance issued or refused any automobile insurance to the applicant or to any of his household? ☐ Yes ☒ No. If 'Yes', explain fully on reverse."

The appellee answered this question "No", signing his name to the application which stated:

“BINDER

“Subject to the conditions on the reverse side, the Company hereby binds the insurance applied for, to become effective

as of 6:05 ~~AM~~ PM 12 17, 1952.
Month Day Year

Application signed: 6:05 ~~AM~~ PM 12 17, 1952.
Month Day Year

“I hereby declare the facts stated herein to be true and request the Company to issue the insurance, and any renewals thereof, in reliance thereon.

Oscar F. Erickson,
(Applicant signs here)''

The pertinent portion of the reverse side of the application reads as follows:

“5. Any insurance bound hereunder shall otherwise be subject in all respects to the terms and conditions of the regular policy form of the Company at present in use and to the statements in this application. If a policy is issued, it shall bear the effective date as provided on the face hereof.”

Coverage was extended immediately, i.e., the appellant immediately bound itself to give full insurance protection giving a signed copy of the application to appellee stating insurance was in force. In due course a policy was issued (Plaintiff's Exhibit No. 1) which contained the following terms:

“The Allstate Insurance Company, a stock company, Home Office Chicago, in reliance upon the declarations on the supplement page and subject to the limits of liability exclusions, conditions and other terms of this policy and for payment of the premium, Allstate agrees with the named insured
* * *

Supplement Page.

7. During the past two years with respect to the named insured or to any member of his household no insurer has cancelled or refused any automobile insurance. * * *

‘The Following Conditions Apply to All Coverages:

‘(1) Effective policy acceptance:

‘By acceptance of this policy the named insured agrees that the declarations on the supplement page are his agreements and representations and that this policy embodies all agreements relating to this insurance existing between himself and Allstate or any of its agents.’ ”

This insurance coverage was issued by appellant because “defendant did, in fact, materially rely on the representation made by the plaintiff in the policy and on the negative answer of the plaintiff to the question asked of him at the time of his application for the said insurance policy.” (Opinion Tr. p. 16, Findings of Fact 9, p. 38.) This binder coverage and the policy subsequently issued could not and would not have been so issued as was done in this case if appellee had answered the question concerning previous cancellation “Yes”. (Tr. p. 136, Tr. p. 146.)

Unknown to appellant, the appellee admittedly had received a letter from his previous insurance carrier prior to his application to Allstate Insurance Company on December 17, 1952, which read as follows (Plaintiff's Exhibit No. 2):

“December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson

P. O. Box 812
Booneville, California.

Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy #528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-dr. Sed., motor number V19458.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Our draft in the amount of \$11.35 is being forwarded to our representative for disposition.

This represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,

G. M. Cowden /s/

Underwriting Superintendent”

Appellee knew of his previous bad accident record with the State Farm Mutual Insurance Company and had knowledge that the cancellation was because of the loss record. (Tr. pp. 80, 81, 88, 89.)

Subsequently, in February of 1953, appellee's car was in an accident. In the course of investigation of it and claims under the policy, appellant learned of the State Farm Mutual Insurance Company cancellation (Tr. p. 162) and reserved its rights by letter to appellee. (Plaintiff's Exhibit No. 8.) Subsequently, appellant disclaimed coverage. (Tr. p. 162.)

Appellant brought a declaratory relief action in Sonoma County, California, where venue existed because of the issuance of the policy at that place. Appellee had the declaratory relief action dismissed under the discretionary power of that Court in order to file this action as plaintiff in the Federal Court. (Tr. pp. 178-179.)

After trial of this action judgment was rendered for appellee, the Court stating in its opinion (Tr. p. 18), that appellee had not made a false representation as affirmatively alleged in Paragraph II of the special defense of appellant set forth in the answer to complaint. (Tr. p. 14.)

III. QUESTIONS INVOLVED.

The opinion of the trial Court and the findings of fact and conclusions of law based thereon pose the direct question as to whether or not there was a cancellation of insurance issued to appellee within two (2) years preceding December 17, 1952 when he answered the question in the application concerning cancellation "No".

There is a further question as to whether, under the provisions of the Insurance Code of the State of California, there was a material misrepresentation and breach of warranty on the part of appellee in failing to disclose his cancellation and recent insurance history at the time he made the application of December 17, 1952.

IV. SPECIFICATION OF ERRORS.

1. The trial Court erred in not holding that a cancellation of the State Farm Mutual Insurance Company policy had occurred on receipt by appellee of the letter of December 15, 1952 from State Farm Mutual Insurance Company.

2. The trial Court erred in construing the State Farm Mutual Insurance Company letter of December 15, 1952 to be a "threat to cancel" rather than a present cancellation.

3. The trial Court was in error in stating that appellee truthfully answered when he applied to Allstate Insurance Company that he did not have an insurance policy cancelled or refused.

4. The trial Court erred in not following the rule of law expressed in *American Glove Company v. Pennsylvania Insurance Company*, 15 Cal. App. 77, and in *Allstate Insurance Company v. Moldenhauer*, 193 Fed. 2d 663.

V. SUMMARY OF ARGUMENT.

1. The letter of December 15, 1952 from State Farm Insurance Company constituted a cancellation.

2. The rule of decision in California demands sensible construction of insurance contracts and squarely rejects the trend to distort language in order to avoid the plain import of the words used.

3. There was no ambiguity in the letter of December 15, 1952 and it was a present unequivocal cancellation.

4. Uniformity of decision requires that the rule of *Allstate Insurance Company v. Moldenhauer* on identical facts be observed.

5. Concealment of a cancellation was a misrepresentation constituting a breach of warranty causing a policy issued in reliance on misrepresentation to be void from inception and entitling the insurer to rescind.

VI. ARGUMENT.

The trial Court concluded and found that the December 15, 1952 letter of the State Farm Mutual Insurance Company to appellee did not constitute cancellation of his existing insurance because the effective date of cancellation was stated in it to be December 27, 1952 which was a time subsequent to the application to appellant on December 17, 1952 for a policy.

It is submitted that this letter is an unequivocal statement of cancellation so entitled and plainly intended:

“December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson

P. O. Box 812
Booneville, California

Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy #528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-dr. Sed., motor number V19458.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952, and no further protection will be afforded after that date.

Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,

G. M. Cowden /s/

Underwriting Superintendent.”

It is submitted that the trial Court gave an erroneous interpretation of plain language and an interpretation contrary to established principles of law.

Under the rule of *Erie v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, the law of the State of California should be applied in this controversy because the contract of insurance was made in this state.

The effect of a letter such as that sent by State Farm Mutual Insurance Company to appellee on

December 15, 1952 has been construed in this state in the case of *American Glove Company v. Pennsylvania Insurance Company*, 15 Cal. App. 77.

In the American Glove case the Pennsylvania Insurance Company wrote as follows:

“San Francisco, April 9th, 1906.

Register.

American Glove Co., 3648 19th Street, S.F.

Gentlemen: — We desire to terminate our liability under Policy No. 170062 issued in your favor for \$1500, covering on stock of gloves and machinery. The policy will be canceled on our books on the 14th inst., five days from date. Kindly return the policy to this office, together with the earned premium of \$5.15 on that date. The plant being shut down permanently makes it undesirable. Bill enclosed herewith.

Yours very truly,

R. W. Osborn,

1 enclo.

Manager.”

The District Court of Appeal held that this was not an expression of intention to cancel at a future time but a present resort to the right to cancel:

Pages 80-81:

“Plaintiff in the same connection argues that the notice of April 9th was not a notice of cancellation, but merely of an intention to cancel, and therefore insufficient. But the notice expressed defendant’s present ‘desire to terminate liability.’ The policy required ‘five days’ notice of such cancellation,’ and for this reason the form of expression was adopted that the policy ‘will be

canceled on our books on the 14th inst., five days from date.' Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company desiring then to cancel the policy and to terminate its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective."

Pages 81-82:

"Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice.

"In *Davidson v. German Ins. Co.*, 74 N. J. L. 487, (65 Atl. 996, 13 L. R. A., N. S., 884), the converse of the question raised by plaintiff was presented. There, under a cancellation clause similar to the one here involved, the trial court had instructed the jury that a notice that 'your policy is canceled' was no notice at all, the required form being, 'Your policy will be canceled in five days.' In holding this instruction to be erroneous the court of errors and appeals said: 'The notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company positively, distinctly and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the

time when this intention is made known to the insured. And it does not matter whether this information is conveyed by the use of the words, 'Your policy will be canceled in five days,' or 'Your policy is already canceled.'

"Even where the policy permits immediate cancellation upon notice, an unequivocal notice that the company will, on and after a certain future date, consider the policy canceled is held effective. The assured upon whom such a notice was served would be left in no doubt of the purposes of the company. He could not fail to understand that it was notice of the cancellation of the policy, to take effect on the day named in the notice. (*Lattan v. Royal Ins. Co.*, 45 N. Y. 453, 458.)

"It is finally contended by plaintiff that some affirmative act of cancellation by the company, in addition to the notice given by it to the insured, was necessary to terminate its liability, and that the 'act of cancellation' mentioned in the letter of April 13th was premature, five days not having elapsed since either the mailing or the receipt of the prior notice, and that consequently the risk was not terminated before the occurrence of the loss. But no affirmative act of cancellation beyond the giving of the notice was necessary."

The Court held further that even a mistake in the number of days in which coverage would be extended following cancellation notice did not vitiate the plain tenor of the letter manifesting a present cancellation.

The American Glove case has been followed in numerous decisions of many jurisdictions to this day

and is a most frequently cited case in every authority on the subject of cancellation of insurance policies.

35 A. L. R. 900;

Appleman on Insurance, Vol. 6, Sec. 4194;

Black on Recision of Contract and Written Instruments, Vol. 2, Sec. 481;

Joyce on Insurance, 2d Edition, Secs. 1670, 1670-A, 45 C. J. S. page 88;

32 C. J. 1249, 1250;

14 Cal. Jur. 438.

The proper interpretation of the State Farm Mutual Insurance Company letter of December 15, 1952 to appellee is that there was a cancellation made by the company, completed and expressed in it for there was no statement of an intention to act on any contingency at any future date and there was no requirement of any further act on its part to make the cancellation effective.

As was said in *Knutzen v. Truck Insurance Exchange*, 90 Pac. 2d 282 at 285, 199 Wash. 1:

“The essence of a notice when sufficient in form and content is its objective consequences upon the one who receives it, not the subjective attitude of one who gives it.”

This common sense statement is borne out by the fact that appellee was well aware that his insurance was cancelled by the State Farm Mutual Insurance Company on receipt of the letter because he immediately applied to appellant for insurance within a day of the receipt of the letter or on the day he received it.

Appellee had no reason to seek insurance coverage from appellant if he did not know that his previous policy had been cancelled by State Farm Mutual Insurance Company.

The trial Court, in its opinion (Tr. pp. 17-18), felt that the question asked of appellee concerning previous cancellation was ambiguous. Under the rule expressed in the *Knutzen* case, *supra*, and evidence of the objective conduct of appellee on receipt of the letter in seeking a new policy, it must be clear that there was no ambiguity insofar as appellee was concerned.

Section 1644 of the Civil Code of the State of California compels this conclusion:

“Section 1644. Words to Be Understood in Usual Sense. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

See also *Massachusetts Mutual Life Insurance Company v. Pistolesi*, 160 Fed. 2d 668 at 669.

In the case of *Emery v. Pacific Employers Insurance Company*, 8 Cal. 2d, the Supreme Court of the State of California construed a similar cancellation, stating at page 670:

“If the insurer clearly and unequivocally indicates its unwillingness to continue upon the risk there is a refusal by the company within the mean-

ing of the warranty provision, notwithstanding the insurer's request that the insured return the policy for cancellation with the request he complies." (Citation.)

The trial Court in the opinion (Tr. p. 18) indicates that it was the effective date of the termination of coverage on December 27, 1952 that constituted a "cancellation". In other words, the trial Court construed the State Farm Mutual Insurance Company letter of December 15, 1952 to be in effect a threat to cancel.

That the State Farm Mutual Insurance Company letter of December 15, 1952 did not constitute a threat to cancel on December 27, 1952 but was a present cancellation is, therefore, clearly demonstrated. The distinction between a threat to cancel at a future time as opposed to a present cancellation is well demonstrated in *Wisconsin Mutual Gas Company v. Employers Liability Company, et al.*, 58 N.W. 2d 424, 263 Wis. 633. There a directed verdict was given against Liberty Mutual Insurance Company which had denied coverage to an insured. Prior to the accident Liberty Mutual Insurance Company had written its insured as follows:

"In accordance with the provisions of the policy contract, we hereby cancel Policy No. 4-4930-NL, said cancellation to be effective as of 12:01 A.M. Standard Time, May 10, 1949."

Included with the notice was a separate card which reads:

“The protection afforded by your insurance will terminate on the cancellation date specified in the attached letter. If your check for the entire premium is received prior to the date of cancellation we shall gladly reinstate your coverage and continue your insurance protection without interruption.” (58 N. W. 2d at page 427.)

On appeal by Liberty Mutual Insurance Company the Court reversed the judgment, stating that this was not an ambiguous or equivocal cancellation and the Court reasoned (page 428) :

“In the case at bar the notice sent by the company clearly expressed an election to cancel the policy. It set forth a specific time when the cancellation would be effective. There is nothing in any part of the notice or the accompanying card that may fairly be said to amount to a retraction or modification of the cancellation. It was there said: ‘The protection afforded by your insurance will terminate on the cancellation date specified in the attached letter.’ Such notice was clearly an effective notice to terminate the policy under the decision of the Washington Supreme Court in *Trinity Universal Ins. Co. v. Willrich*, 124 Pac. 2d 950, and the notice in the instant case is clearly distinguishable from those in the cases relied upon by the trial judge and urged in argument here.

In *Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wisc. 226, 70 N. W. 84, 88, 37 L. R. A. 131, this Court stated: ‘There must be an actual notice of cancellation . . . not . . . a notice that the policy will be cancelled.’ The foregoing quotation clearly states the distinction between the two lines of cases holding notices of cancellation to be

effective or not effective. If the notice is to be construed as a threat to cancel (if the premium is not paid), then it is not effective; but if it states absolutely that the policy is cancelled (as did the notice in the instant case), then it is effective and the wording of the enclosed post card did not have the effect of making the notice of cancellation a mere threat.

The insured and his mortgagee were thereby notified that only by paying the entire premium would the insured be given further protection. In a cancellation, 'It is only necessary that the company positively, distinctly, and unequivocally indicated to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this intention is made known to the insured.' '' (Citing among other authorities, the *American Glove* case, *supra*.)

To the same effect the well-reasoned case of *Ralston v. Royal Insurance Company*, 140 Pac. 552, 79 Wash. 557, confirms the interpretation of the letter of the State Farm Mutual Insurance Company of December 15, 1952 to have constituted a cancellation. In this case the insurance company wrote as follows:

"Notice of Cancellation for Non-payment of Premium. Seattle, Wash. February 4, 1913. You are hereby notified that payment has not been made at this office of the premium of \$18.88 under Policy No. 705877 . . . Demand is therefore made on you for said premium and unless the same is paid on or before 12 o'clock noon of the 9th day of February, 1913 . . . said policy . . . will stand cancelled for non-payment of premium,

without further notice and all liability thereunder immediately cease and determine after said hour and date.”

The property was destroyed on February 13, 1913.

In 140 Pac. 553, it further states:

“It is next argued that the notice served did not purport to be a present cancellation, but indicated only an intention to cancel at a future time, conditioned upon the non-payment of the premium. Many authorities are cited sustaining the rule that a notice which only shows an intention to cancel at a future time, and upon non-compliance with certain conditions is not sufficient. A review of these authorities would render little, if any aid, as each must depend to a large extent upon the language of the cancellation notice. In the present case the notice is more than a mere expression of an intention to cancel at a future date, it is an unequivocal declaration that if the premium is not paid as on or before 12 o’clock upon the day named, then the policy ‘will stand cancelled for the non-payment of the premium without further notice.’ Language could hardly make it plainer that it was the intention, if the premium were not paid as indicated, that then the policy was cancelled and this without further notice.”

See Appleman on Insurance, Vol. 6, Sec. 4185.

That the State Farm Mutual Insurance Company letter of December 15, 1952 constituted a cancellation has heretofore been determined by the Circuit Court of Appeals, Seventh Circuit, in the case of *Allstate Insurance Company v. Moldenhauer*, 193 Fed. 2d 663.

On March 31, 1947, State Farm Mutual Insurance Company wrote Mr. Moldenhauer as follows: (For purposes of comparison, we set forth below the letter addressed to Mr. Moldenhauer and the letter addressed to appellee):

“December 15, 1952

Mr. O. F. Erickson and
Mrs. Birdella A. Erickson
P. O. Box 812
Booneville, California

(Tr. p. 23)

Dear Mr. and Mrs. Erickson:

“Dear Mr. Moldenhauer:

Re: Cancellation of Policy
#528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

It is our desire to be relieved of liability for insurance on the above numbered policy.

Policy #528848-B04-05 is being cancelled effective 12:01 A.M. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Policy #14791-NS-49 is being cancelled effective 12:01 A.M., Standard Time, April 6, 1947 and no further protection will be provided on your 1936 DeSoto four door sedan after that date.

Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

The \$11.99 returnable from this cancellation is being sent to your agent for his disposition.

We regret that we are unable to be of service to you.

Very truly yours,

Very truly yours,

G. M. Cowden /s/
Underwriting Superintendent”

Underwriting Department”

On April 4, 1947, Mr. Moldenhauer went to Allstate Insurance Company for insurance after receiving this letter of March 31, 1947. He knew that his policy had been cancelled with coverage ending on April 6, 1947.

Mr. Moldenhauer's conduct was as follows (Tr. pp. 23, 24, 25) :

“Q. Now, on April 4, 1947, you went to the Allstate Insurance Company for insurance, did you not?

A. The 4th, yea.

Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

A. Yeah.

Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

The Court. What is the date of the State Farm letter?

Mr. Kluwin. The letter of March 31, 1947, which is Allstate's Exhibit 2.

A. What was that?

The Court. You may answer the question.

(Whereupon the reporter read the pending question.)

A. I had received a letter that I would be cancelled the 6th.

Q. (by Mr. Kluwin). And it was your desire to get new insurance to go into effect on April 6th; is that correct?

A. That is what I wanted, yeah.

Q. So that in response to that letter you went to the Allstate to try to get insurance?

A. I had figured on insuring with them before, but now I was compelled to get insurance. I

didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

Q. If you hadn't received this letter from the State Farm Mutual, referred to as Exhibit 2, when would your insurance have expired; do you know?

A. That I don't know for sure.

Q. Some months later?

A. I don't know for sure.

Q. But in response to this letter you then went to the Allstate's office in the Sears, Roebuck store?

A. That is why I went down there, yeah."

Mr. Moldenhauer, like Mr. Erickson in the instant case, falsely stated that his policy had not been cancelled, when in truth and in fact it had been, and he had received the cancellation letter.

Mr. Moldenhauer continued (Tr. pp. 25 and 26):

"Q. (by Mr. Kluwin). Now, Mr. Moldenhauer, before you took out this policy with the Allstate Insurance Company you were insured by the State Farm, were you not?

A. I was what?

Q. You were insured with the State Farm Insurance Company?

A. State Farm Mutual.

Mr. Barly. Excuse me John; he doesn't hear very well. Will you get fairly close to him?

Mr. Kluwin. If I may stand here, if the court please.

The Court. I think if you were closer, over there.

Q. (by Mr. Kluwin). Now, Mr. Moldenhauer, do you have the policy that was issued by the

State Farm Insurance Companies that was in effect just before you took out insurance of the Allstate?

A. I haven't got it now any more.

Q. As far as you know you destroyed that policy; is that correct?

A. Yeah.

Q. In any event the policy that you had with them was cancelled, was it not?

A. Not at the day I insured with Allstate.

Mr. Kluwin. I move that that answer be stricken as not responsive.

The Court. Well, what is 'cancellation'? Was there a failure of renewal in this case or was there an outright cancellation?

Mr. Kluwin. There may be an issue here but I don't think there is any dispute about the fact that the policy was cancelled. Isn't that true, Mr. Barly?

Mr. Barly. I have no proof of it. We can't find any letter that the company had written to him.

Mr. Kluwin. May I ask this question, then, and renew the objection later, if the court please:

Q. Did you ever receive a letter from the State Farm Insurance Companies advising you that they were cancelling the policy?

A. They said they would cancel it the 6th.

Q. You received such a letter?

A. Yeah."

(Tr. pp. 27 and 28):

"Q. And did you see a man by the name of Mr. Mickle there?

A. Yeah.

Q. And at that time did he take an application from you?

A. Yeah.

Q. And did he ask you certain questions?

A. The question was, have you been cancelled?

Q. No. Did he ask you certain questions?

A. Well, some questions, sure.

Q. And you made certain answers?

A. Yeah.

Q. And was one of these—in one of these questions he asked you whether you had ever had any insurance cancelled, did he not?

A. I said not as far as yet; that's my words.

Q. Did you tell him that you had received the letter from the State Farm Mutual?

A. He didn't inquire and I didn't answer him.

Q. I say, did you tell him?

A. No.

Q. You didn't tell him that you received a letter that your policy was being cancelled effective April 6th, did you?

A. No.

Q. And at that time you signed the application after it had been filled out; is that right?

A. Yeah.

Q. I show you what has been marked here as Allstate's Exhibit No. 4, and ask you if at the lower left-hand corner your signature, 'Max W. Moldenhauer', appears?

A. If what?

Q. If that is your signature.

A. Yeah.

Q. And that is the application that you signed?

A. Yeah."

Compare appellee Erickson's conduct under a similar situation (Tr. pp. 80-81):

“Q. (by Mr. Walcom). You had had about eight losses from 1948 to 1952, had you not, collision losses, to your car?

A. Not that many.

Q. You had several, in any event, did you not?

A. Well, personally I never had any, but I am the father, so I will take the blame.

Q. Let us take the last one immediately prior to the cancellation letter, that was when an intoxicated person was driving your car, isn't that true?

A. That's right.

Q. And then came that letter advising you they were no longer going to carry you, isn't that true?

A. That is right.

Q. And that letter is dated December 15 of 1952?

A. Yes.

Q. You received that the following day, Mr. Erickson?

A. Will you repeat that question?

Q. Could you tell us on what day you received that letter of State Farm advising you that they were going to cancel you? On what date did you receive it?

A. I think on the 15th or 17th, or in between that.

Q. In any event, immediately upon the receipt of that letter, you then went down to Santa Rosa to Allstate Insurance Company?

A. That is correct.

Q. Yes. And it is true, is it not, that you were asked first of all whether or not any insurance

company had cancelled you within two years preceding your application and/or whether any insurance company had refused you coverage; you were asked that question?

A. That's right.

Q. And at that time you said 'No', didn't you?

A. That's right."

In the *Moldenhauer* case the trial Court rendered judgment for the plaintiff Allstate Insurance Company. The findings of fact and conclusions of law were as follows (Tr. pp. 29-30):

"6. That prior to the issuance of said policy of insurance the said Max W. Moldenhauer executed an application for insurance in which he declared that no insurer had ever cancelled any automobile insurance which it had issued to him.

7. That Allstate Insurance Company issued Policy No. M002734 based upon the express warranty made by the said Max W. Moldenhauer, which express warranty read as follows: 'Has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household, to which question the said Max W. Moldenhauer answered "No".'

8. That State Farm Mutual Insurance Company of Bloomington, Illinois, previous insurer of the said Max W. Moldenhauer, notified the said Max W. Moldenhauer on April 6, 1947, that it was cancelling his insurance, and that one, Mrs. Lehman, wife of the agent for State Farm Mutual Insurance Company, informed the said Max

W. Moldenhauer that said policy of insurance was being cancelled because of the number of small accidents in which the said Max W. Moldenhauer had been involved.”

The conclusions of law related in part as follows (Tr., p. 46):

“1. That the policy of automobile liability insurance No. M002734 issued April 6, 1947, by Allstate Insurance Company to Max W. Moldenhauer, and the subsequent renewal policy issued April 6, 1948, are null and void from the date of their original issuance because of the failure on the part of said Max W. Moldenhauer to disclose material facts, which failure to so disclose increased the risk.

Judgment followed.”

In an appeal which followed, the United States Court of Appeals affirmed the judgment, stating in part at page 664, as follows (emphasis ours):

“The case was tried by the court without a jury. The trial judge found that prior to the issuance of the policy of insurance to the issuance of the policy of insurance Moldenhauer had executed an application for insurance in which he declared that *no insurer had ever cancelled any automobile insurance which it had issued to him*, and that plaintiff had issued the policy involved herein upon the express warranty made by Moldenhauer that no insurer had ever cancelled any automobile insurance which had been issued to him. *The court also found that prior to the issuance of plaintiff's policy Moldenhauer had been insured with the State Farm Mutual Insurance Company, which company had, before plain-*

tiff issued its policy, notified Moldenhauer that it was cancelling his insurance, and he was informed that the State Farm policy was cancelled because of the number of small accidents in which he had been involved. Thus it clearly appears that Moldenhauer's declaration that no insurer had ever cancelled any automobile insurance which had been issued to him was false."

It is submitted that the trial Court's finding that there was no cancellation at the time appellee applied to appellant for insurance coverage is entirely contrary to the established legal authorities, the plain import of language without ambiguity and could only encourage immoral conduct on the part of applicants for insurance policies.

The trial Court was under the misapprehension that there had not been a cancellation of appellee's policy until December 27, 1952, which was the date that coverage ended. The Court overlooked entirely the fact that the letter of December 15, 1952, was unequivocal in its tenor, required no further act on the part of State Farm Mutual Insurance Company, and that no contingent event need occur. When that letter was written it was a definite cancellation and it scarcely requires that one must cite legal authorities to this effect. The trial Court should not impose a construction of ambiguity when it was most apparent to the appellee Erickson himself that he had been cancelled because he immediately sought to secure new insurance coverage.

The conduct of appellee in concealing the cancellation of his previous automobile insurance policy prior

to application to appellant must be considered in view of the pertinent sections of the California Insurance Code.

Section 330 reads as follows:

“Definition. Neglect to communicate that which a party knows, and ought to communicate, is concealment.”

Section 331 reads as follows:

“Effect. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.”

Section 338 reads as follows:

“Information Proving Falsity of Warranty. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.”

If the insurer was misled by statements made, it is immaterial whether the insured's omission to state the true facts was intentional or unintentional.

Mirich v. Underwriters at Lloyds of London,
64 Cal. App. 2d 522.

Section 440 reads as follows:

“Kinds of Warranties. A warranty is either express or implied.”

Section 441 reads as follows:

“Express Warranty. A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.”

Section 443 reads as follows:

“Express Warranty to Be Embodied in Policy or Other Instrument. Every express warranty made at or before the execution of a policy shall be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it.”

Section 444 reads as follows:

“Time of Warranty. A warranty may relate to the past, the present, the future, or to any or all of these.”

Section 449 reads as follows:

“Breach Without Fraud. A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk.”

When a statement in an application for insurance is declared by the policy to be a warranty and the insured declares the statement to be true, falsity thereof voids the policy ab initio.

Craig v. U.S.F. & G. Company, 11 Cal. App. 2d 644;

Eddy v. National Union Indemnity Company (Ninth Circuit), 78 Fed. 2d 545;

Gilmore v. Eureka Casualty Company, 123 Cal. App. 20;

Emery v. Pacific Employers Insurance Company, 8 Cal. 2d 663 at page 669;

Allstate Insurance Company v. Miller, 96 Cal. App. 2d 778 at page 782.

See also excellent discussion in:

*General Accident Life and Fire Insurance
Company v. Industrial Accident Commission*,
196 Cal. 179 at pages 187-188.

All of the available evidence has been adduced and is set forth in the transcript.

It would serve no purpose to return this cause for retrial because under the law it is inconceivable that the appellee could prevail and because the interpretation given by the trial Court of the letter of December 15, 1952, issued by State Farm Mutual Insurance Company as a "threat to cancel" rather than a present cancellation cannot be sustained.

This Court should reverse the judgment heretofore rendered and direct that judgment for the appellant be granted.

Dated, San Francisco, California,
May 2, 1955.

Respectfully submitted,

HEALY AND WALCOM,

By LEO J. WALCOM,

Attorneys for Appellant.

No. 14,708

IN THE

United States Court of Appeals
For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

OSCAR F. ERICKSON,

Appellee.

APPELLEE'S OPENING BRIEF.

PAUL FRIEDMAN,

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Attorney for Appellee.

FILED

JUL 29 1955

PAUL P. O'BRIEN, CLERK

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No. 14,708

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALLSTATE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

OSCAR F. ERICKSON,

Appellee.

APPELLEE'S OPENING BRIEF.

I.

THE ISSUES OF THIS CASE ARE QUESTIONS OF FACT FOR THE TRIAL COURT WHICH HAS ALREADY TWICE RESOLVED THEM IN FAVOR OF PLAINTIFF.

Not only did the trial Court determine the issues after trial upon the evidence and the Court's own observation of the witnesses, as well as upon oral and written argument of opposing Counsel (Opinion Tr. p. 15); but a second time, upon application of the appellant by notice of motion for an order to reopen the cause for further authorities and evidence, together with points and authorities in support thereof, and upon argument and hearing of that motion. (Tr. p. 35.)

It is the law of the State of California that the defense of breach of warranty is a question of fact, the burden of proof being upon the defendant.

If the trial Court finds that even though some evidence in support of this defense has been adduced by the insurer, yet the evidence is conflicting, a verdict in favor of the plaintiff, by reason of defendant's failure to sustain the burden of proof required of the insurer will not be disturbed by the Appellate Court.

Bennett v. Northwestern National Ins. Co., 84 Cal. App. 130.

Code of Civil Procedure of State of California reads as follows:

“1847. Presumption of Truthfulness; Rebuttal; Credibility. Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility. (Enacted 1872.)”

The principle enunciated by this Code section has been repeatedly affirmed and asserted by California Appellate Courts, which have refused to disturb the decisions and findings of the trial Court as to credibility of witnesses, weight of evidence, or the truth

or falsity of allegations in issue as found by the trial Court. Some cases where the principles of this statute have been reenunciated are:

Singh v. Kashian (1954), 268 P. 2d 768, 124 C.A. 2d Supp. 879;

Hanna v. O'Connor (1951), 236 P. 2d 181, 106 C.A. 2d 760;

El Rio Oils, Canada, Limited v. Pacific Coast Asphalt Co. (1950), 213 P. 2d 1, 95 C.A. 2d 186, certiorari denied 71 S. Ct. 77, 340 U.S. 850, 95 L. Ed. 623;

People v. Woods (1946), 170 P. 2d 477, 75 C.A. 2d 246;

Taylor v. Industrial Accident Commission (1940), 100 P. 2d 511, 38 C.A. 2d 75.

Section 1981 of the Code of Civil Procedure of the State of California reads as follows:

“1981. Burden of Proof. Evidence to be produced by whom. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side. (Enacted 1872.)”

There are many cases under this section of law, but a group in point are the following:

Bennett v. Northwestern Nat. Ins. Co., Supra;
Ocean Accident & Guaranty Corp. v. Rubin
(CCA 1934), 73 F. 2d 157, 96 A.L.R. 412;

Weir v. New York Life Ins. Co. (1934), 36 P. 2d 847, 1 C.A. 2d 516;

Prince v. Kennedy (1906), 85 P. 859, 3 C.A. 404;

Finn v. Vallejo Street Wharf Co. (1857), 7 C. 253.

The principle enunciated by all of the above cases, that the question whether or not there has been a breach of warranty on the part of the assured sufficient to void the policy of insurance from the inception, and the good or bad faith of the assured in making the representations claimed to have been false, are all matters of fact for the trial Court to determine, runs through virtually all of the cases cited by the defendant in its opening brief.

Based upon this basic principle, it is very difficult to quarrel with these cases. On pages 14 and 29 of the defendant's opening brief, is cited the case of *Emery v. Pacific Employers Ins. Co.*, 8 Cal. 2d 663. This case is excellent authority for the proposition that the burden of proving a breach of warranty is upon the defendant insurance company asserting the same, and is a question of fact for the trial Court. In that case there actually were three prior cancellations of insurance policies, effective dates occurring prior to the date the applicant for the insurance secured the same from the defendant insurance company, plaintiff in his application for insurance denying any prior cancellation. Nevertheless, the trial Court on various technical grounds prevented the defendant from introducing evidence of these prior cancellations, and then, based upon such exclusion of evi-

dence, the trial Court directed a verdict for the plaintiff. All that the Appellate Court did in that case was to return the case to the trial Court so that the matter of introduction of such evidence of prior cancellations might be introduced by the insurance company defendant upon a new trial.

Analysis of innumerable cases decided on the general subject of the trial of the issue of forfeiture of an insurance policy by reason of breach of warranty at the inception, leads to the inescapable conclusion that it is always a question of fact for the trier of fact.

Penn Mutual Life Ins. Co. v. Mechanics Savings Bank and Trust Co., 72 Fed. 413 at page 441, 73 Fed. 653;

Gates v. Madison Co. Ins. Co., 5 N.Y. 469 on page 474;

Olson v. Standard Marine Ins. Co., 109 C.A. 2d 130, 240 P. 2d 379 on pages 137 and 138, citing many cases.

II.

THERE IS NO QUESTION OF LAW PRESENTED TO THE APPELLATE COURT REQUIRING A REVERSAL OF THE TRIAL COURT.

The only question that seems to be presented now to this Court would be, assuming that the case of *Allstate Insurance Company v. Moldenhauer*, 193 Fed.

2d 663, relied on so heavily by appellant in their brief, actually is congruent in all its facts with the case at issue, is the Ninth Circuit Court of Appeals thereby constrained to follow that case as a principle of *stare decisis*?

The answer to that question has been made many many times in the past in many of our various Circuit Courts of Appeals, and it would be futile to cite these innumerable cases where the various Circuit Courts have not seen fit to follow decisions rendered in other Circuit Courts on the principle of *stare decisis*, but have made their own decisions, even though the facts in the case before them appear to be almost exactly the same as a case that has been decided in the other Circuit. However, the principle of *stare decisis* in this case very readily can be interpreted to uphold the position of the respondent appellee on the appeal.

In the *Moldenhauer* case, the Circuit Court of Appeals, Seventh Circuit upheld the findings of the trial Court.

The Appellate Court in the Seventh Circuit in the *Moldenhauer* case, did not make new findings, but merely upheld the decision of the trial Court. This Court is not required under any principles of law to vitiate, vacate, or abrogate the findings of the trial Court on the issues of the instant case.

Examining the law that has been submitted to this Court by appellant as supporting its application for a reversal of the trial Court, as if it were never argued before, it becomes difficult to see how in any

way the cases and authorities relied upon by appellant require any reversal of the trial Court. *The American Glove Company* case (15 Cal. App. 77) so heavily relied on by appellant as raising a legal foundation for the argument that a notice of intended cancellation effective at a future date is a cancellation effective as of the date it is issued, becomes almost ridiculous upon an examination of the facts of the *American Glove Company* case.

In that case, the American Glove Company suffered a fire loss and sued the alleged insurer, the Pennsylvania Insurance Company, claiming that they were still covered at the time of their loss under their policy of fire insurance with that company. They had received a notice of intended cancellation deposited in the mail on the 9th day of April 1906, effective as of the 14th day of April 1906. A fire occurred on the 19th day of April 1906, five days after the effective date of cancellation.

Quoting from the decision, page 79:

“The sole question in the case is whether or not the policy was in force at the time of the loss, or had been cancelled prior to that time by the defendant.”

and again on page 81:

“The meaning of this (referring to ‘will be cancelled on our books on the 14th instant, 5 days from date’) was in substance that the insurance company, desiring to cancel the policy and to terminate its risk thereby, gave the insured the

5 days notice prescribed by the policy, *at the expiration of which the* cancellation would become effective.” (Parenthetical enclosure mine.)

The Court in its discussion of the effect of the notice sent, is merely clarifying the nature of the notice, taking the obvious position that it was a clear cut notice of intention to cancel effective as of a future certain date when sent. There can hardly be any argument as to the lack of existing insurance on the date of the fire suffered by the plaintiff in that case. The case in no way is on all fours with the instant one.

Of course, all subsequent case and text authority relying upon and citing the *American Glove Company* case, cited by counsel for appellant in his brief, particularly on pages 13 and 17 thereof, can be no more persuasive of appellant’s cause than their source, the *American Glove Company* case.

The general rule that the insurance company having written the policy through its experts will be deemed to be bound by its own language, and that the Court will never seek for a strict construction which will sustain a forfeiture, but rather strictly construe the language against the company, and will be liberal in its construction in favor of the assured, so that the insurance which he contracted for will be given effect, hardly bears recital, but in view of the defendant’s having raised the issue, in addition to the authorities already cited by the trial Court, the fol-

lowing are some additional authorities on this general subject:

Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 29 Am. Jur., Section 164, 29 Am. Jur. 166, notes and cases, 29 Am. Jur. 167, cases; *Sampson v. Central Indemnity Co.*, 8 Cal. 2d 476;

Christisen v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N.W. 980;

Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783;

Hampton v. Hartford Fire Ins. Co., 65 N.J.L. 265;

Wright v. Fraternities Health & Accident Assoc., 107 Me. 418, 78 A. 495;

American Credit Indemnity Co. v. E. R. Apt Shoe Co., 74 F.2d 345;

Union Indemnity Co. v. Dodd, 21 F.2d 709.

As an example of the strictness of construction in policies attempted to be forfeited by insurance companies imposed upon the companies by the Courts is *Rabin v. Central Businessman's Association*, 116 Kan. 280, 226 P. 764, where the Court held a warranty no other insurance has been cancelled, is not a warranty as to non-prior cancellation where there has been prior voluntary surrender and cancellation of the policy by reason of such surrender.

In the case of *Wright v. Fraternities Health and Accident*, supra, the Court held that where an assured had had an application for life insurance re-

jected by another company, and then in answer to a question in an application for Health and Accident insurance replied "No", to the question "Has any company, society or association ever rejected your application?", was not making a warranty of non-prior cancellation by giving this negative answer, since the wording of the question by its express terms did not refer to life insurance.

Applying the above rule as a rule of law, issues already having been determined as issues of fact, it cannot fairly be said that the application form and declarations in the insurance policy in the instant case prepared by the insurer itself were so clear and unambiguous on their face, the Court already having found that the statements made by the applicant were in good faith, that this Court, as an Appellate Court, should be constrained upon the face of the policy and the application form and the language therein contained, to reverse the trial Court.

Appellant attempts to fall back also upon various provisions of the Insurance Code as authority requiring this Court to reverse the trial Court as a matter of law. The sections of the Insurance Code of the State of California cited by appellant are all conditioned by other sections not cited, also contained in the same Insurance Code. Particularly pertinent are Sections 332, 333, 335, and 336 of the same Code, which read as follows respectively:

"332. Required Disclosures. Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowl-

edge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining. (Enacted 1935.)”

“333. Matters Not Required to Be Disclosed Except Upon Inquiry. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.
3. Those of which the other waives communication.
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.
5. Those which relate to a risk excepted from insurance, and which are not otherwise material. (Enacted 1935.)”

“Section 335. Presumed Knowledge. Each party to a contract of insurance is bound to know:

- (a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated.
- (b) All the general usages of trade. (Enacted 1935.)”

“336. Waiver of Right to Information. The right to information of material facts may be

waived, either (a) by the terms of insurance or (b) by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated. (Enacted 1935.)”

Examining once again the facts of this case for the purpose of applying some of these principles of law as expressed in the Insurance Code and cases which will be cited herein, it may be observed upon examination of defendant's Exhibit D that at the time Mr. Erickson applied for his insurance with the defendant Allstate Insurance Company, they received the name of his previous insurance company, State Farm Insurance Company, the number of his State Farm policy and inserted in the form by the defendant's agent what the agent said Erickson claimed as the expiration date of the State Farm policy, the 17th day of December, 1952, the same day the application was being made to Allstate Insurance Company. Of course, all information filled in on the back of the application form by the agent was not accurate, e.g., “nationality Swedish” when Erickson was American born but there obviously was enough information in possession of defendant if it desired to examine into the matter, which would very readily have produced the facts that they claim, when readily ascertained after the accident, relieved them of liability under their contract.

Mr. Wood, underwriter for the defendant Allstate Insurance Company, testified that a letter of inquiry,

a common practice of the company, or a phone call by the Allstate Insurance Company would have revealed all the information as to prior cancellation, if any, that his company now attempts to use as an excuse to defeat insurance (Tr. p. 148). However, the company made not the slightest inquiry at the time the application was made, but instead subsequently issued its policy of insurance containing its own printed form of declarations.

As the Court has said in its opinion (Tr. pages 17 and 18):

“The insurer here was a national company doing business throughout the nation. It maintains a booth in various Sears stores for the purpose of selling insurance, and the policy in question was issued at such a booth. It was in a position to know of the possibility that facts such as prevail here might arise. Any printed questions or declarations that the insurance company felt were proper or desirable could have been printed in the application and policy. It chose to phrase the language used in the manner set out above. If it desired more detailed or other information, it could have asked for it. The answer of the plaintiff, taken literally, was not false. The plaintiff did not make these statements with bad faith or with any intent to deceive or falsify. When he stated that his previous insurance had not been cancelled, he was not in error. It was being cancelled some ten days later. Therefore, there was no false representation or breach of warranty by the insured, and the insurer will not be permitted to void the policy from its inception on that ground.”

The company did not choose to phrase its policy application or declaration to ask the question "Has any insurer ever forwarded a notice of cancellation?" or some similar protective language, if it so desired, and chose not to make the slightest attempt to check up or inquire about the applicant's insurance status with all the information they might require readily available.

There is a great deal of authority in California and in the United States, both new and old, that will not permit the insurance company, as a matter of law, to escape liability upon such careless writing of their policy and application forms and failure to investigate or check up in the slightest degree upon facts readily available to them. Many of these cases also state that the insured is not required to give answers as to facts upon which no inquiry is made, since the insurance company may protect itself by the wording of their contract as to such information.

- Olson v. Standard Marine Ins. Co.*, supra;
Columbian National Life Ins. Co. v. Rogers,
 116 F.2d 705, certiorari denied 313 U.S. 561;
*Penn Mutual Life Ins. Co. v. Mechanics Bank
 and Trust Co.*, supra;
Gates v. Madison Co. Ins. Co., supra;
Protection Ins. Co. v. Hamer, 2 Ohio State
 452 on page 473;
Clark v. Manufacturers Ins. Co., 8 How. 235;
Federal Land Bank of St. Paul v. Edwards,
 262 Michigan 180, 247 N.W. 147 on page
 149.

In *Newman v. Firemen's Ins. of Newark*, 67 CA.2d 386, 145 P.2d 451, interpreting sections 332, 333, and 335 of the Insurance Code of California, the Court held that an insurance company is bound by knowledge readily available to it, of the previous bad record and insurance status of an assured, even though he conceals this information on a new application to the carrier.

In *E. F. Boyd Co. v. U. S. F & G Co.*, 35 CA.2d 171, where the carrier wrote a surety bond to cover an employee where employer did not reveal the fact that employee was a convicted embezzler, insurance company was held bound to ascertain this fact from records available to them.

CONCLUSION.

The trial Court in its opinion has cogently and succinctly given its reasons for rendering judgment in favor of the plaintiff appellee, Oscar F. Erickson. The trial Court's findings of fact, conclusions of law, and its written opinion make it clear that plaintiff should recover against the defendant insurance company, if the case be considered both from the view point of factual and legal issues. This brief has merely attempted to gather more extensive authority on the well reasoned principles applied by the trial Court to the determination of this case. The trial Court, as pointed out in Point I of this brief, heard the evidence, saw the witnesses, weighed the matter carefully on at least two occasions, both as to facts and

as to law, and made its decision in favor of the plaintiff. The defendant has presented nothing in its brief which would require this Court to supplant the decision of the trial Court, either on the facts or on the law.

Wherefore, the undersigned respectfully prays that this Court dismiss appellant's appeal, returning the case to the trial Court in status quo, leaving the verdict of the trial Court outstanding as against this defendant.

Dated: San Francisco, California,
July 27, 1955.

Respectfully submitted,

PAUL FRIEDMAN,

Attorney for Appellee.

No. 14,708

United States Court of Appeals
For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a Corporation,

Appellant,

VS.

OSCAR F. ERICKSON,

Appellee.

APPELLANT'S REPLY BRIEF.

HEALY AND WALCOM,

68 Post Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

AUG 22 1955

PAUL P. O'BRIEN, CLERK



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United States Court of Appeals For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a Corporation,

Appellant,

VS.

OSCAR F. ERICKSON,

Appellee.

APPELLANT'S REPLY BRIEF.

1. THE GROUNDS OF THIS APPEAL DO NOT INVOLVE A CONFLICT OF EVIDENCE, BUT A LEGAL CONSTRUCTION ON THE EVIDENCE THAT SHOULD BE MADE ACCORDING TO WELL ESTABLISHED AUTHORITY.

Appellee's brief has recourse to the familiar principle that to the Court alone is committed the function of deciding questions of fact, and that an appellate tribunal will not interfere with a decision supported by substantial evidence.

In seeking to persuade this Court that an appeal merely presents a challenge as to the weight of the evidence, appellee has adopted a device of long standing. This effort to cloud the issue should be futile.

Appellee devotes a substantial portion of his brief under Subject I (pages 1-5, Appellee's Opening

Brief) to a discussion of the sufficiency of the evidence to support a finding by the trial Court and to a discussion of the burden of proof. It is submitted that this discussion is entirely irrelevant to the issue framed in the trial Court's judgment, as set out in the opinion (Tr. 16, 17):

"The principal question thus raised is whether the receipt of a letter from an insurer stating that an existing policy 'is being cancelled' effective at a future date renders false a representation that 'no insurer has cancelled or refused any automobile insurance' made to another insurer after receipt of the letter but before the future effective cancellation date."

The Court resolved this question by stating (Tr. 18) that the answer of appellee to the question on the application, concerning cancellation, was not false and, therefore, there was no false representation. Thus, the Court concluded as a fact that the letter of State Farm Mutual Insurance Company (Plaintiff's Exhibit No. 2) did not constitute a present cancellation.

It is submitted that, as a matter of law, that this letter did constitute a present cancellation. Appellant has cited extensive and overwhelmingly persuasive authorities to that effect and appellee has cited absolutely no authorities to the contrary. The trial Court found (Tr. 16) the insurance policy was issued by the appellant in reliance on the statement that no cancellation had been made. Thus, the entire judgment admittedly is predicated upon the determination of whether or not the State Farm letter (Plaintiff's

Exhibit No. 2) constituted a present cancellation or not. The trial Court in deciding that it did not constitute a present cancellation thus made a further finding that no false representation occurred. It follows as the night the day that had the trial Court construed that letter as a present cancellation, that there would have been a false representation.

Therefore, there appears no conflict of evidence regarding the facts of this case, the conflict is purely a legal one insofar as the construction properly to be placed upon the State Farm Mutual letter (Plaintiff's Exhibit No. 2) determines whether or not a false representation was made, which would, as explained in Appellant's Opening Brief, permit the policy to be rendered void *ab initio*.

The authorities and statutes cited in Subject I of Appellee's Opening Brief, with the exception of the case of *Emery v. Pacific Employers Insurance Company*, 8 Cal. (2d) 663, require no comment since they do not affect the issue in this appeal.

2. APPELLEE HAS FAILED TO PRESENT ANY CASES IN SUPPORT OF THE LEGAL CONSTRUCTION OF THE STATE FARM MUTUAL'S LETTER (PLAINTIFF'S EXHIBIT NO. 2) UPON WHICH THE TRIAL JUDGMENT STAND OR FALL.

Appellant in its opening brief took pains to present to this Court the unchallenged authority concerning the wealth of judicial interpretation of the terminology of a letter of cancellation couched in the terms of Plaintiff's Exhibit No. 2. Appellee has failed

to present any authority to the contrary. It is respectfully submitted that there is no authority against the cogent and common sense approval of such terms as in this letter to constitute a present cancellation.

3. APPELLEE HAS OVERLOOKED THE PROVISIONS OF SECTION 1644 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH DIRECT:

“Section 1644. Words to be Understood in Usual Sense. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” and which this Court has heretofore approved.

See:

Massachusetts Mutual Life Insurance Company v. Pistolesi, 160 Fed. (2d) 668.

There is no question but that the appellee understood that he was being presently cancelled when he answered the application interrogation concerning previous cancellation, “no”. Within a day, he presented himself at appellant’s place of business to make his application for insurance. In view of this conduct, we again refer to the wisdom of the citation from *Knutzen v. Truck Insurance Exchange*, 90 Pac. (2d) 282 at page 285, 199 Wash. 1:

“The essence of a notice when sufficient in form and content is its objective consequences upon

the one who receives it, not the subjective attitude of one who gives it.”

Certainly, the conduct of the appellee demonstrated that the prime import of a present cancellation was known to him.

4. **THE APPLICATION OF ALLSTATE INSURANCE COMPANY v. MOLDENHAUER**, 193 FED. (2d) 663, TO THE CASE AT ISSUE.

The *Moldenhauer* case has been discussed in our opening brief and the actual trial transcript presented. There is no question but that there are circuits of our Federal Courts which have and will differ in determinations of similar controversies. However, the letters involved in both instances afford no room, in view of the legal authorities in support of the Seventh Circuit Court of Appeals' decision, to disregard a precedent in an arbitrary fashion.

The conduct of citizens being guided by statutory and case law requires a proper observation of precedent.

5. **APPELLEE MISCONSTRUES THE HOLDING IN AMERICAN GLOVE COMPANY v. PENNSYLVANIA INSURANCE CO.**, 15 CAL. APP. 77.

This case holds that the letter itself constitutes a cancellation, regardless of the fact that coverage continues as it did in that instance for five days because of a policy requirement that five days' notice be given. The holding in the *American Glove* case is

diametrically opposed to that of the trial judge from whose decision this appeal has been taken. Had the *American Glove* case been decided by the same reasoning of the trial judge in the instant case, no cancellation would have occurred until after the fire of April 19, 1906. However, as we have pointed out by generous citation in our opening brief (pages 10-12), the Court held:

“The policy required ‘five days’ notice of such cancellation,’ and for this reason the form of expression was adopted that the policy ‘will be canceled on our books on the 14th inst., five days from date.’ Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company, desiring then to cancel the policy and to terminate its risk, thereby gave the insured the five days’ notice prescribed by the policy, at the expiration of which the cancellation would become effective.

* * * * *

Here five days’ notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice.”

Appellee, therefore, fails to distinguish the fact that a cancellation is a present effective act, although the effective termination of coverage may be extended for a limited time after the clear, unequivocal declaration of cancellation. Authorities cited by appellee

concerning construction of the policy are not pertinent.

A careful examination of the authorities cited on page 9 of Appellee's Opening Brief fails to reflect any case that is not readily distinguishable from the problem at bar and it is submitted an examination of them by this Court will reflect the same conclusion.

**6. SECTION 333 OF THE INSURANCE CODE IS NOT
APPLICABLE TO THIS CASE.**

There was no evidence in this case that would excuse the false representation of appellee under any of the subdivisions of Section 333 of the Insurance Code. Appellant was unaware of the previous cancellation and it had no reason to distrust the applicant and did not waive, but expressly conditioned the application as a truthful relation of the facts upon which it relied in the issuance of its coverage.

There was certainly no exclusion from the representations of the past cancellation history of the applicant and lastly, misrepresentation was material for it was one upon which the issuance of a policy was determined.

7. APPELLANT CANNOT BE PRESUMED TO KNOW OF APPELLEE'S FALSE REPRESENTATION NOR DID IT WAIVE ITS RIGHT TO RELY UPON THE REPRESENTATIONS IN HIS APPLICATION.

Appellee has cited Sections 335, 336 of the Insurance Code in support of a contention that the appellant was presumed to know appellee was falsely representing. As the evidence will reflect (Defendant's Exhibit D) appellant procured all the necessary information relating to the vehicle involved and the names of those whom the appellee stated would operate it. It is bound to know these things under Section 335 and such might be the general usages of the trade set forth in that section. However, it is inconceivable that morally, ethically, or legally one who falsely represents could claim that because dishonest conduct on his part has been perpetrated, that a Court should condone it on the ground that one who deals with another must anticipate falsity and dishonesty!

The record will show through the testimony of the witness Wood (Tr. 145-148) that complete reliance was made upon the representation that appellee had not been cancelled and that contrary to the contention of appellee at page 13 of his opening brief, there was no reason to make inquiry concerning appellee's past insurance history.

Appellee cites a portion of the trial Court's opinion at page 13 of his brief. It is submitted that the observations of the trial Court would impose a burden upon it which, under the circumstances of this case, are not necessary. The trial Court in that opinion

comments that the reply was not made in bad faith or with intent to deceive. There is no evidence in the entire record of this case that would support the dictum that appellee acted not in bad faith. On the contrary, the act of appellee in applying to appellant immediately upon receipt of the cancellation letter indicates that he answered the application question in bad faith. The Court goes on to say that the appellee was not in error when he stated that his previous policy had not been cancelled and thus cloaks his activities in that regard with an aura of sanctity. As a matter of fact, bad faith or intent to deceive is not at all an issue in this case for it has been held in the case of *Mirich v. Underwriters of Lloyds, London*, 64 Cal. App. (2d) 522 that if the insurer was misled by statements, *it is immaterial whether the insured's omission to state the true facts was intentional or unintentional*. Appellee contends on pages 14 and 15 of his brief with citations of cases readily distinguishable from the problem at bar, that there is a kind of waiver or estoppel on the part of appellant because of "such careless writing of their policy and application forms and failure to investigate." In other words, appellee admits the right of the appellant to declare this policy void *ab initio*, but would excuse it because the appellee was successful in winning the confidence of the appellant by an untruthful reply to its question in the application.

CONCLUSION.

Honest dealing among parties is the foundation of our national, economic, and social well-being. Of the untold contractual relations daily assumed among our citizens, undoubtedly but a fraction are tainted by dishonesty or false conduct. As the trial Court comments, the appellant is a large corporation and deals with millions of persons in its ordinary affairs of business. Each policyholder is one with whom a contract is executed and it is the premium of each policyholder that constitutes a fund available to indemnify another. Appellant is no more nor any less entitled to rely on the honesty and representations of persons contracting with it than any other citizen in the conduct of his affairs. Such dealing is predicated upon honest and fair disclosures, clearly understood by those who make them, which form the meeting ground upon which can be resolved the decision whether to contract or not.

In this case, the evidence reflects the same customary and usual practice of appellant in dealing with a policy applicant. It was entitled to rely upon his representations. It is readily submitted that the reservation by appellee from an honest disclosure of his previous cancellation misled appellant into the issuance of a policy which it otherwise would not have considered for immediate binding, or subsequent issue of its policy.

The issue in this case as to whether or not the State Farm Mutual Letter (Plaintiff's Exhibit No. 2) constituted a present cancellation has been amply

demonstrated to be such by the conduct of the appellee himself following its receipt and as a matter of law by the copious citation of authorities heretofore set forth in appellant's opening brief.

This Court should reverse the judgment heretofore rendered and direct a judgment in favor of the appellant.

Dated, San Francisco, California,

August 17, 1955.

Respectfully submitted,

HEALY AND WALCOM,

By LEO J. WALCOM,

Attorneys for Appellant.



No. 14712

United States
Court of Appeals
for the Ninth Circuit

ELLEN MOLNAR,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY,
INC., a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

JUN 20 1955

PAUL P. O'BRIEN, CLERK



No. 14712

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM R. LUND,
WM. JEROME POLLACK,
VIVIAN M. FELD,

6361 Wilshire Boulevard,
Los Angeles 48, California.



In the United States District Court for the Southern District of California, Central Division

No. 17853-WM

ELLEN MOLNAR,

Plaintiff,

vs.

NATIONAL BROADCASTING COMPANY,
INC., a corporation, DOE 1-X, Defendants.

COMPLAINT

(Damages for Personal Injuries)

Plaintiff complains of defendants above named and each of them as follows:

I.

The true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe 1-X are unknown to plaintiff who therefore sues said defendants by such fictitious names. When the true names and capacities of such fictitiously designated defendants are ascertained, plaintiff will ask leave of court to amend this complaint to insert said true names and capacities, together with the proper charging allegations. Plaintiff is informed and believes and thereon alleges that each of the defendants sued herein as a Doe is responsible in some manner for the events and happenings herein referred to, and caused injury and damages proximately thereby to the plaintiff as herein alleged.

II.

Plaintiff is a citizen and resident of the State

of California; defendants, and each of them, are citizens and residents of the State of Delaware.

III.

This is an action wholly between citizens of different states involving an amount in controversy in excess of \$3,000.00, exclusive of interest and costs.

IV.

Defendant National Broadcasting Company, Inc., a corporation, is now, and at all times mentioned herein, was a corporation organized and existing under and by virtue of the laws of the State of Delaware and authorized to do and engaged in doing business in the State of California.

V.

At all times herein mentioned, defendants, and each of them, owned, operated, managed and controlled that certain building and premises located on the northeast corner of the intersection of Sunset Boulevard and Vine Street, in the City of Los Angeles, County of Los Angeles, State of California, and in particular a stairway, leading to said premises near the Sunset and Vine entrance thereto.

VI.

On or about May 21, 1954, plaintiff was on said premises and was using the said stairway.

VII.

At said time and place the defendants, and each of them, so negligently and carelessly maintained,

operated, managed and controlled said stairway that the same was in a dangerous, unsafe and defective condition, thereby causing plaintiff to fall and to be hurled to the ground, thereby proximately sustaining the injuries and damages as hereinafter alleged.

VIII.

As a direct and proximate result of the aforesaid negligence and carelessness of the defendants, and each of them, the plaintiff was permanently hurt and injured in her health, strength and activity, sustaining severe shock and various injuries to her person, all of which said injuries have caused and continue to cause plaintiff great mental, physical and nervous pain and suffering, and which said injuries the plaintiff is informed and believes and thereon alleges will result in permanent disability to the said plaintiff, all to her damage in the sum of \$35,000.00.

IX.

As a direct and proximate result of the aforesaid negligence and carelessness of the defendants, and each of them, the plaintiff was compelled to and did employ physicians and surgeons to examine, treat and care for her and did incur medical and hospitalization expenses and incidental expenses and plaintiff is informed and believes and therein alleges that plaintiff will necessarily by reason of said injuries require additional doctor and medical care and incidental expenses.

Wherefore, plaintiff prays for judgment against defendants and each of them as follows:

1. For general damages in the sum of \$35,000.00;
2. For all doctor, hospitalization, medical and incidental expenses according to proof;
3. For costs of suit.
4. For such other and further relief as to the court may seem proper.

/s/ WM. JEROME POLLACK,
Attorney for Plaintiff

Plaintiff also demands a jury trial of the above entitled matter and that the same be tried before a jury.

/s/ WM. JEROME POLLACK,
Attorney for Plaintiff

[Endorsed]: Filed February 8, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 17853-WM—Civil

ELLEN MOLNAR, Plaintiff,

vs.

NATIONAL BROADCASTING COMPANY,
INC., a corporation, DOE I-X, Defendants.

**ORDER DISMISSING ACTION FOR WANT
OF JURISDICTION OVER THE SUBJECT
MATTER**

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U.S.C. § 1332; Indianapolis vs. Chase National Bank, 314 U.S. 63, 69-70, 76-77 (1941); Parker vs. Overman, 18 How. (59 U.S.) 137, 141 (1855); Mullen vs. Torrance, 9 Wheat. (22 U.S.) 537, 538 (1824)];

(2) that there is no claim or cause of action asserted in the complaint which “arises under the Constitution, laws or treaties of the United States” [28 U.S.C. § 1331; Gully vs. First National Bank, 299 U.S. 109, 112-114 (1936); Puerto Rico vs. Russell & Co., 288 U.S. 476, 483-484 (1933); Hooe vs. United States, 218 U.S. 322, 335-336 (1910); Scribner vs. Straus, 210 U.S. 352 (1908); Wade vs. Lawder, 165 U.S. 624 (1897); Dale Tile Mfg. Co. vs. Hyatt, 125 U.S. 46 (1888); Republic Pictures Corp. vs. Security etc. Bank, 197 F.2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8(a)(1), 28 U.S.C.A. 252 (1950)] do not affirmatively appear [Robertson vs. Cease, 97 U.S. 646, 648-650 (1878); Ex Parte Smith, 94 U.S. 455, 456 (1876)], this court of limited jurisdiction [Shamrock Oil Co. vs. Sheets, 313 U.S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [Bors vs. Preston, 111 U.S. 252, 255 (1884); Grace vs. American Central Ins. Co., 109 U.S. 278 (1883); Turner vs. Bank of North America, 4 Dall. (4 U.S.) 7, 11 (1800); New York Life Ins. Co. vs. Kaufman, 78 F.2d 398, 400 (9th Cir. 1935)];

It Is Ordered upon the Court's own initiative [Fed. Rules Civ. Proc., Rule 12(h), 28 U.S.C.A.] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A.].

It Is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U.S.C.A.].

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

February 10, 1955.

/s/ WM. C. MATHES,

United States District Judge

[Endorsed]: Judgment docketed and entered February 11, 1955.

[Endorsed]: Filed February 11, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ellen Molnar, plaintiff in the above entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and judgment entered in this action on February 11, 1955, dismissing said action for want of jurisdiction over the subject matter.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff

[Endorsed]: Filed March 11, 1955.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Appellant, plaintiff in the above entitled action, intends to rely upon the appeal of the above entitled action upon the following points:

1. That the court erred in dismissing said action for want of jurisdiction of the subject matter thereof;

2. That the court has jurisdiction of this matter in that it involves an action wholly between citizens of different states and an amount in controversy in excess of \$3000.00, exclusive of interest and costs.

Dated: March 10, 1955.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff

[Endorsed]: Filed March 11, 1955.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

Appellant, Ellen Molnar, named in the notice of appeal filed on March 11, 1955, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal to the United States Court of Appeals for the Ninth Circuit:

1. Complaint for personal injuries;
2. Order and judgment dismissing action for want of jurisdiction over subject matter, docketed and entered on February 11, 1955.

Dated: March 11, 1955.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff

[Endorsed]: Filed March 11, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 9 inclusive, contain the original
Complaint;

Order Dismissing Action for Want of Jurisdiction Over the Subject Matter;

Notice of Appeal;

Appellant's Statement of Points Upon Which She Intends to Rely;

Appellant's Designation; all in said cause, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 1st day of April, 1955.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Endorsed]: No. 14712. United States Court of Appeals for the Ninth Circuit. Ellen Molnar, Appellant, vs. National Broadcasting Company, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 4, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14712

ELLEN MOLNAR,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY,
INC., a corporation, et al., Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Pursuant to Rule 17(6) of the rules of the United States Court of Appeals for the Ninth Circuit, Appellant, Ellen Molnar, hereby adopts the Statement of Points Upon Which She Intends to Rely heretofore filed with the United States District Court for the Southern District of California, Central Division, and constituting page 8 of the record herein, and hereby designates for printing the following documents on the following pages of the record docketed in the above entitled court:

1. Names and addresses of attorneys, page 1.
2. Complaint for personal injuries, pages 2 through 4.
3. Order and judgment dismissing action for want of jurisdiction, pages 5 through 6.
4. Notice of appeal, page 7.

5. Statement of points upon which appellant intends to rely, page 8.

6. Appellant's designation, page 9.

Dated: April 6, 1955.

/s/ WM. JEROME POLLACK,
Attorney for Appellant

[Endorsed]: Filed Apr. 7, 1955. Paul P. O'Brien,
Clerk.



No. 14712

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELLEN MOLNAR,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., a corporation,
et al.,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

WILLIAM R. LUND,

WM. JEROME POLLACK,

VIVIAN M. FELD,

6361 Wilshire Boulevard,
Los Angeles 48, California,

Attorneys for Appellant.

FILED

JUN 23 1955

PAUL P. O'BRIEN, CLERK



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No. 14712

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELLEN MOLNAR,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., a corporation,
et al.,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts.

A complaint for personal injuries was filed by appellant in the United States District Court for the Southern District of California, Central Division. Paragraph II of said complaint alleges as follows:

“Plaintiff is a citizen and resident of the State of California; defendants, and each of them, are citizens and residents of the State of Delaware” [R. pp. 3-4].

Paragraph III of said complaint alleges as follows:

“This is an action wholly between citizens of different states involving an amount in controversy in excess of \$3000.00, exclusive of interest and costs” [R. p. 4].

Before any appearance of the defendants, an order was made by Judge Mathes dismissing the action for want of jurisdiction over the subject matter [R. p. 7].

This is an appeal from said order of dismissal on the ground that the court did have jurisdiction under 28 U. S. C., Section 1332.

Statement of the Case and Question Involved.

The sole question involved on this appeal from said order of dismissal is as follows:

WHERE A COMPLAINT NAMES CERTAIN UNKNOWN DEFENDANTS (DOES) AND ALLEGES THAT SAID UNKNOWN DEFENDANTS ARE CITIZENS AND RESIDENTS OF THE SAME STATE AS THE KNOWN, NAMED DEFENDANTS, WHICH STATE OF CITIZENSHIP AND RESIDENCE IS DIVERSE FROM THAT OF PLAINTIFF, DOES THE UNITED STATES DISTRICT COURT HAVE JURISDICTION OF THE CASE ON THE BASIS OF DIVERSITY OF CITIZENSHIP, ASSUMING THE AMOUNT IN CONTROVERSY TO BE IN EXCESS OF \$3,000.00, EXCLUSIVE OF INTEREST AND COSTS?

The learned trial judge, Judge Mathes, held that under those circumstances there was not the complete required diversity of citizenship and so dismissed the action. A copy of Judges Mathes' opinion is annexed hereto and marked "Appendix A."

Specification of Errors Relied On.

The sole error complained of on this appeal is that the court erred in dismissing the complaint for lack of jurisdiction.

Argument.

Our research has failed to disclose any reported cases other than those cited by Judge Mathes.

However, this precise point is raised in the case of *Roth v. Will Mastin Trio, et al.*, U. S. Court of Appeals No. 14713, now pending on appeal in this court. In that case a motion to dismiss based on the same reason, was *denied* by Judge Harrison. We respectfully refer this court to the brief to be filed in that case.

Appellant herein intends to move for a consolidation of these cases on appeal.

Respectfully submitted,

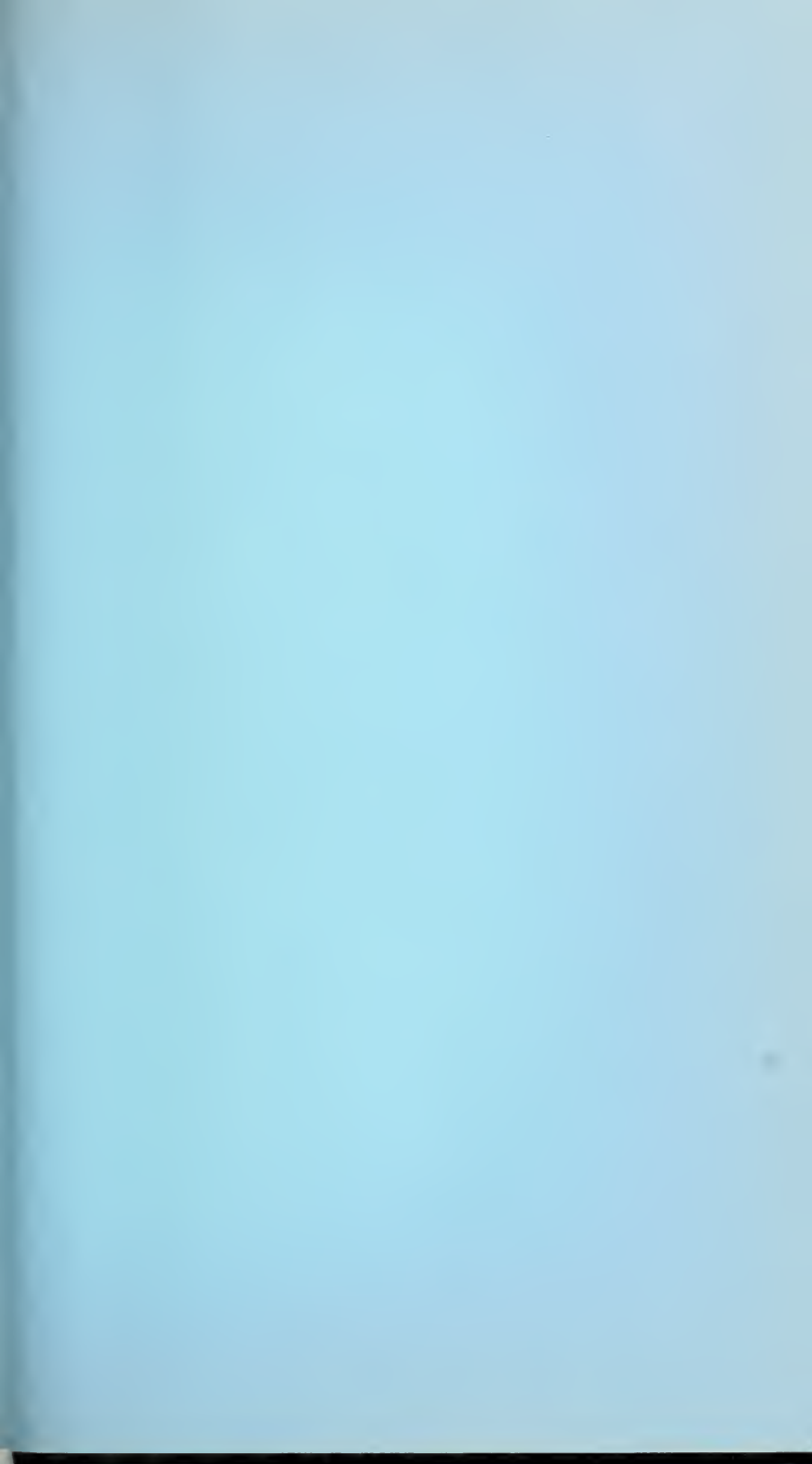
WILLIAM R. LUND,

WM. JEROME POLLACK,

VIVIAN M. FELD,

Attorneys for Appellant.







APPENDIX A.

United States District Court, for the Southern District of California, Central Division.

Ellen Molnar, Plaintiff, v. National Broadcasting Company, Inc., a corporation, Doe I-X, Defendants.

No. 17853-WM Civil.

ORDER DISMISSING ACTION FOR WANT OF JURISDICTION OVER THE SUBJECT MATTER.

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U. S. C., §1332; Indianapolis v. Chase National Bank, 314 U. S. 63, 69-70, 76-77 (1941); Parker v. Overman, 18 How. (59 U. S.) 137, 141 (1855); Mullen v. Torrance, 9 Wheat. (22 U. S.) 537, 538 (1824)];

(2) that there is no claim or cause of action asserted in the complaint which "arises under the Constitution, laws or treaties of the United States" [28 U. S. C., §1331; Gully v. First National Bank, 299 U. S. 109, 112-114 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476, 483-484 (1933); Hooe v. United States, 218 U. S. 322, 335-336 (1910); Scribner v. Straus, 210 U. S. 352 (1908); Wade v. Lawder, 165 U. S. 624 (1897); Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46 (1888); Republic Pictures Corp. v. Security etc. Bank, 197 F. 2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8(a)(1), 28 U. S. C. A. 252 (1950)] do not affirmatively appear [Robertson v. Cease, 97 U. S. 646, 648-650 (1878);

Ex Parte Smith, 94 U. S. 455, 456 (1876)], this court of limited jurisdiction [Shamrock Oil Co. v. Sheets, 313 U. S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [Bors v. Preston, 111 U. S. 252, 255 (1884); Grace v. American Central Ins. Co., 109 U. S. 278 (1883); Turner v. Bank of North America, 4 Dall. (4 U. S.) 7, 11 (1800) New York Life Ins. Co. v. Kaufman, 78 F. 2d 398, 400 (9th Cir. 1935)];

It Is Ordered upon the Court's own initiative [Fed. Rules Civ. Proc., Rule 12(h), 28 U. S. C. A.] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U. S. C. A.].

It Is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U. S. C. A.].

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

February 10, 1955.

Wm. C. Mathes

United States District Judge

Endorsed: Filed Feb. 11, 1955. Edmund L. Smith, Clerk
by C. A. Simmons, Deputy Clerk.

Judgment Docketed and Entered Feb. 11, 1955, Edmund L. Smith, Clerk; by C. A. Simmons, Deputy Clerk.

No. 14713

**United States
Court of Appeals**
for the Ninth Circuit

BESSIE ROTH,

Appellant,

vs.

SAMMY DAVIS, JR.,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILE

AUG 24 1955

PAUL R. O'BRIEN,



No. 14713

**United States
Court of Appeals
for the Ninth Circuit**

BESSIE ROTH,

Appellant,

VS.

SAMMY DAVIS, JR.,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

VIVIAN M. FELD,
WM. JEROME POLLACK,

6361 Wilshire Blvd.,
Los Angeles 48, Calif.

For Appellees:

HULEN C. CALLAWAY,
JOHN S. BOLTON,

210 W. 7th St.,
Los Angeles 14, Calif.



In the United States District Court for the Southern
District of California, Central Division

No. 17562

BESSIE ROTH,

Plaintiff,

vs.

WILL MASTIN TRIO, SAMMY DAVIS, JR.,
SAMMY DAVIS, WILL MASTIN, DOE I-X,

Defendants.

COMPLAINT

(Damages for Personal Injuries)

Plaintiff complains of defendants above named
and each of them as follows:

I.

Defendants are citizens and residents of the State
of California; plaintiff is a citizen and resident of
the State of Ohio.

II.

This is an action and controversy between citizens
of different states involving an amount in excess of
\$3,000.00, exclusive of interest and costs.

III.

The true names or capacities, whether individual,
corporate associate or otherwise, of defendants Doe
I-X are unknown to plaintiff, who therefore sues
said defendants by such fictitious names. When the
true names, identities or capacities of such [2*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

fictitiously designated defendants are ascertained, plaintiff will ask leave of court to amend this complaint to insert said true names, identities or capacities, together with the proper charging allegations. Plaintiff is informed and believes and thereon alleges that each of the defendants sued herein as a Doe is responsible in some manner for the events and happenings herein referred to, and caused injury and damages proximately thereby to the plaintiff as herein alleged.

IV.

Plaintiff is informed and believes and thereon alleges that at all of the times mentioned herein, defendants, and each of them, were the owners of the motor vehicle referred to in this complaint and generally described as a 1954, black, Cadillac convertible automobile.

V.

Plaintiff is informed and believes and thereon alleges that at all times mentioned herein the defendant, Sammy Davis, Jr., was the agent, servant and employee of his said co-defendants, and was acting within the time, place, purpose and scope of the said employment and agency.

VI.

Plaintiff is informed and believes and thereon alleges that at all times mentioned herein the defendant, Sammy Davis, Jr., was driving the aforementioned vehicle with the consent and permission and knowledge of his said co-defendants.

VII.

At all times herein mentioned Kendall Drive was a public street and highway in the County of San Bernardino, State of California.

VIII.

On or about November 19, 1954, plaintiff was riding as a passenger in a 1954, four-door Chrysler automobile which was being operated by one Helen S. Boss in a southerly direction on Kendall [3] Drive in said county and state, at and near its intersection with Verdemont Junction, about nine miles north of San Bernardino, California.

IX.

At said time and place the defendants, and each of them, so negligently and carelessly maintained, drove and operated their said automobile that the same was caused to and did then and there hit, strike and collide with the automobile in which plaintiff was riding as a passenger, thereby proximately causing the injuries and damages to plaintiff hereinafter alleged.

X.

As a direct and proximate result of the aforesaid negligence and carelessness of the defendants, and each of them, the plaintiff was permanently hurt and injured in her health, strength and activity, sustaining severe shock and various injuries to her person, all of which said injuries have caused and continue to cause plaintiff great mental, physical

and nervous pain and suffering and which said injuries the plaintiff is informed and believes and thereon alleges will result in permanent disability to the said plaintiff, all to her damage in the sum of \$75,000.00.

XI.

As a direct and proximate result of the aforesaid negligence and carelessness of the defendants, and each of them, the plaintiff was compelled to and did employ physicians and surgeons to examine, treat and care for her and did incur medical and hospitalization expenses and incidental expenses, and plaintiff is informed and believes and thereon alleges that plaintiff will necessarily by reason of said injuries require additional doctor and medical care and incidental expenses.

XII.

At the time of said collision, plaintiff was capable of working and earning money. As a direct and proximate result of the [4] aforesaid negligence and carelessness of defendants, and each of them, plaintiff was prevented from working and earning money and from attending to her usual occupation and plaintiff is informed and believes and thereon alleges that she will thereby be prevented from attending to said usual occupation and from working and earning money for a long period in the future.

Wherefore, plaintiff prays for judgment against defendants and each of them as follows:

1. For general damages in the sum of \$75,000.00;
2. For all doctor, medical, hospitalization and incidental expenses according to proof;
3. For all loss of earnings according to proof;
4. For all costs of suit;
5. For such other and further relief as to the court may seem proper.

VIVIAN M. FELD,
WM. JEROME POLLACK,
By /s/ VIVIAN M. FELD,
Attorneys for Plaintiff.

[Endorsed]: Filed December 6, 1954. [5]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come Now Will Mastin, Sammy Davis, Sr., and Sammy Davis, Jr., a co-partnership doing business under the fictitious name of Will Mastin Trio, and Sammy Davis, Jr., individually, and for answer to plaintiff's complaint admit, deny and allege as follows:

I.

Answering paragraph I of plaintiff's complaint—

a) Admit that defendants Sammy Davis, Jr., and Sammy Davis, Sr., are residents of the State of

California, but alleges that Will Mastin is a resident of the State of New York;

b) Defendants have no information or belief upon the citizenship and residence of the plaintiff sufficient to enable them to answer the allegations on that subject in said paragraph I contained, and upon that ground deny generally and specifically [6] said allegations concerning the citizenship and residence of plaintiff.

II.

Answering paragraph II these answering defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegations in said paragraph contained and upon this ground deny the same both generally and specifically.

III.

Answering paragraph IV these answering defendants deny the allegations contained both generally and specifically, except that these answering defendants admit that Sammy Davis, Jr., was the owner of the motor vehicle therein described.

IV.

Answering paragraphs V and VI these answering defendants deny the allegations therein contained both generally and specifically.

V.

Admit the allegations contained in paragraph VII.

VI.

These answering defendants admit the allegations contained in paragraph VIII, except that these answering defendants have no information or belief upon the subject of the status of the plaintiff in the Chrysler automobile and upon this ground deny said allegations generally and specifically.

VII.

Answering paragraph IX these answering defendants deny the allegations therein both generally and specifically, except admit that there was a collision between the automobile in which the plaintiff was riding and the automobile being driven by Sammy Davis, Jr. [7]

VIII.

These answering defendants deny generally and specifically each and every allegation set forth in paragraphs X, XI and XII charging negligence and carelessness of these answering defendants, or either or any of them.

These answering defendants allege that they have no information or belief sufficient to enable them to answer each, every and all of the remaining allegations set forth in said paragraphs X, XI and XII and upon this ground denies generally and specifically—

a) That the plaintiff was injured or damaged in the manner or to the extent alleged, or in any other manner, or to any extent, or at all;

b) That the plaintiff suffered damages in the sums alleged in said paragraph X, or in any other sums, or at all;

c) That the plaintiff was compelled to or did incur medical expenses as alleged in said paragraph XI;

d) That the plaintiff was or will be required, by reason of said injury, to require additional doctor and medical care and incidental expenses as alleged in paragraph XI;

e) That the plaintiff suffered a loss of her earnings as alleged in paragraph XII, either in the past or in the future;

f) Each, every and all of the allegations in said cause of action contained, and not hereinbefore admitted or denied.

Further Answering Plaintiff's Complaint and by
Way of a Separate and Affirmative Defense,
Defendants Allege:

That said alleged accident, or injury, or damage, or any or either thereof was occasioned or caused, or in any manner contributed to by these answering defendants, or any carelessness, negligence, fault or liability on the part of these answering [8] defendants, their agents, servants or employees, or either or any of them.

Further Answering Plaintiff's Complaint and by
Way of a Second, Separate and Affirmative
Defense, Defendants Allege:

That the said alleged accident, or injury, or damage, or either or any thereof, was an unavoidable accident and was not caused or occasioned, or in any manner contributed to by these answering defendants, or by any carelessness, negligence, fault or liability on the part of these answering defendants, their agents, servants or employees, or any or either of them.

Further Answering Plaintiff's Complaint and by
Way of a Third, Separate and Affirmative
Defense, Defendants Allege:

These answering defendants are informed and believe, and upon such information and belief allege, that at the time and place mentioned in said complaint, the plaintiff failed to govern and control her movements in a reasonable manner commensurate with the alleged existing conditions, and by her failure to exercise ordinary care and caution, as aforesaid, for her own safety or welfare, or to avoid the happening of said alleged accident, injury or damage, if any, did thereby directly and proximately contribute to the happening of said alleged accident, injury or damage complained of, and to each and all and the whole thereof.

Wherefore, these answering defendants pray that plaintiff take nothing by her complaint: that these defendants have judgment for their costs incurred

herein; and for such other and further relief as to the Court may seem proper.

HULEN C. CALLAWAY,
JOHN S. BOLTON,
By /s/ HULEN C. CALLAWAY,
Attorneys for Defendants.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 28, 1954. [9]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor defendant, Sammy Davis, Jr., individually.

Dated: Los Angeles, California, January 20, 1955.

/s/ EARL SHIRK,
Foreman of the Jury.

[Endorsed]: Filed January 20, 1955. [11]

In the United States District Court, Southern
District of California, Central Division

No. 17,562-BH Civil

BESSIE ROTH,

Plaintiff,

vs.

WILL MASTIN TRIO, SAMMY DAVIS, JR.,
SAMMY DAVIS, WILL MASTIN, et al.,

Defendants.

JUDGMENT ON VERDICT

On the 18th day of January, 1955, this cause came on for trial before the court and a jury duly impaneled on said day; Vivian M. Feld and William Jerome Pollack, appearing as counsel for the plaintiff; and Hulen C. Callaway and John S. Bolton, appearing as counsel for the answering defendants, Will Mastin, Sammy Davis, Sr., and Sammy Davis, Jr., a co-partnership doing business under the fictitious name of Will Mastin Trio, and Sammy Davis, Jr., individually; and the trial having been proceeded with on the 18th and 19th days of January, 1955, before the court and said jury, and during the trial of said cause, testimony having been adduced and exhibits admitted in evidence, and the parties having rested, the cause was continued to the 20th day of January, 1955; and

On the 20th day of January, 1955, the respective counsel having argued to the jury, and the court having instructed the jury on the law, and said

cause was submitted to the jury for its consideration and verdict; and after consideration thereof, the jury thereafter on said 20th day of January, 1955, having returned into court, and after presenting its verdict, which was read by the clerk, the court ordered said verdict filed and entered, and is as follows: [12]

* * *

Now, therefore, by virtue of the law and by reason of the premises aforesaid,

It Is Ordered, Adjudged and Decreed:

That the plaintiff, Bessie Roth, recover nothing by reason of this action, and that the complaint be and is dismissed, and that the defendant, Sammy Davis, Jr., individually, recover his costs herein taxed in the sum of \$189.71.

It Is Further Ordered, on motion of counsel for the plaintiff, that this cause be and it is hereby dismissed as to the remaining defendants, Will Mastin, Sammy Davis, Sr., and Sammy Davis, Jr., a co-partnership doing business under the fictitious name of Will Mastin Trio, and the fictitious named defendants.

Dated: Los Angeles, California, January 21, 1955.

/s/ BEN HARRISON,
U. S. District Judge.

[Endorsed]: Filed and entered January 21, 1955. [13]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiff moves this Court to set aside the verdict and judgment herein and to grant a new trial of the above-entitled cause for the following reasons, viz.:

1. The verdict is contrary to law.
2. Insufficiency of the evidence to support the verdict in that under the defendant Sammy Davis, Jr.'s own testimony, under the physical facts attendant the collision and under all of the evidence the negligence of defendant Sammy Davis, Jr., was at least a proximate cause of the collision and of plaintiff's injuries.
3. The verdict is against the weight of or contrary to the evidence.
4. Error of the court in refusing to admit in evidence plaintiff's exhibit and testimony of a prior consistent statement of plaintiff made by plaintiff to a representative of the defendants. This exhibit and the statements contained therein would have proved a prior consistent statement of the plaintiff and was admissible by [14] reason of the fact plaintiff had been impeached on cross-examination by defense counsel.
5. Error of the court in restricting plaintiff's cross-examination of Mrs. Roth and admonishing counsel with respect to his method of cross-examination with regard to said witness.

6. Error of the court in instructing the jury with the following instructions, which instructions were requested by defendants and which were objected to by plaintiff on the ground that said instructions were outside the issues of the case:

(a) Instruction #37, requested by defendants and given by the court as follows: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

(b) Defendants' requested instruction #52 given by the court as follows: "Defendants were not the insurers of plaintiff's safety and did not guarantee that she would not be injured. Nor can you presume said defendants were negligent merely because the plaintiff was injured."

(c) A second instruction on unavoidable accident requested by defendants and given by the court which instruction plaintiff is unable to identify at the time of making this motion.

Dated: January 28, 1955.

/s/ WM. JEROME POLLACK,
Attorney for Plaintiff. [15]

Points and Authorities

Prior consistent statements are admissible.

Davis v. Tanner,

(1927), 88 Cal. App. 67, 262 Pac. 1106;

People v. Kynette,

(1940), 15 Cal. (2d) 731, 104 P. (2d) 794;

Bickford v. Mouser,

(1942), 53 Cal. App. (2d) 680;

People v. Slobodian,

(1948), 31 Cal. (2d) 555, 191 P. (2d) 1.

It was error for the court to instruct on unavoidable accident.

Huetter v. Andrews,

91 Cal. App. (2) 142.

It was error to instruct the jury that the defendants were not insurers of the safety of plaintiff. Such an instruction is given only in the case of common carriers.

Receipt of copy acknowledged.

[Endorsed]: Filed January 28, 1955. [16]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL AND
TO VACATE JUDGMENT AND ORDER
SHORTENING TIME

Defendants and Hulen C. Callaway and John S. Bolton, Their Attorneys, Please Take Notice that

on February 28, 1955, at 10:00 a.m. or as soon thereafter as counsel can be heard, in the courtroom of Judge Harrison in the above-entitled court at the Federal Building, Los Angeles, California, plaintiff will move the court for leave to dismiss the within action without prejudice. At said time and place plaintiff will further move the court for an order vacating the verdict and judgment heretofore entered in the above-entitled matter.

Said motions will be based upon the ground that the court has no jurisdiction because there is no complete diversity of citizenship.

Said motions will be based upon all the papers and pleadings on file herein and on the points and authorities attached hereto.

Dated: February 23, 1955.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff. [18]

ORDER SHORTENING TIME

Good cause appearing therefor, It Is Hereby Ordered that plaintiff may serve a copy of the notice of motion for dismissal and to vacate judgment on the defendants' attorneys by 4:00 p.m. on Thursday, February 24, 1955.

Dated: February 24, 1955.

/s/ LEON R. YANKWICH,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed February 24, 1955. [19]

[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 28, 1955

Present: Hon. Ben Harrison,
District Judge.

Proceedings: For hearing (1) motion of plaintiff for new trial, pursuant to motion and points and authorities, filed Jan. 28, 1955; and motion (2) of plaintiff for dismissal and to vacate judgment, filed Feb. 24, 1955.

Attorney Pollack makes a statement in support of motion (2) of plaintiff for dismissal and to vacate judgment.

Court makes a statement and Orders motion (2) denied.

Attorney Pollack argues in support of motion (1) of plaintiff for new trial, etc.

Court makes a statement and Orders motion for new trial denied.

EDMUND L. SMITH,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Bessie Roth, plaintiff in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the verdict and judgment entered in this action on January 21, 1955, granting judgment in favor of defendant Sammy Davis, Jr., and from the denial on February 28, 1955, of plaintiff's

motion for leave to dismiss said action without prejudice and to vacate said judgment.

Dated: March 14, 1955.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 15, 1955. [23]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
UPON WHICH SHE INTENDS TO RELY

Appellant, plaintiff in the above-entitled action, intends to rely upon the appeal of the above-entitled action upon the following points:

1. That the court did not have jurisdiction of the above-entitled matter in that there was not complete diversity of citizenship and no federal question was involved;

2. That it was error for the court to enter the judgment against plaintiff in the above-entitled matter in that the court did not have jurisdiction of said matter inasmuch as there was lacking complete diversity of citizenship and no federal question was involved.

Dated: March 15, 1955.

/s/ VIVIAN M. FELD,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 15, 1955. [25]

In the United States District Court for the Southern
District of California, Central Division

No. 17562-BH

BESSIE ROTH,

Plaintiff,

vs.

WILL MASTIN TRIO, et al.,

Defendants.

Deposition of Bessie Roth, taken on behalf of the defendants, at 1018 Marco Place, in the City of Los Angeles, California, commencing at 10:00 a.m. on Thursday the 6th day of January, 1955, before Alice E. Kuppert, a Notary Public in and for the County of Los Angeles, State of California, pursuant to the annexed Stipulation, under Sections 2021 and 2055 of the Code of Civil Procedure of the State of California.

Appearances of Counsel:

For the Plaintiff:

WILLIAM JEROME POLLACK, ESQ.

For the Defendant:

HULEN C. CALLAWAY, ESQ., and
JOHN S. BOLTON, ESQ.

Thursday, January 6, 1955, 10:00 A.M.

BESSIE ROTH

the plaintiff herein, called as a witness by and on

(Deposition of Bessie Roth.)

behalf of the defendants, having been first duly sworn, deposed and testified as follows:

Mr. Callaway: Can it be stipulated, Mr. Pollack, that this deposition is being taken in case number 17562-BH in the United States District Court for the Southern District of California, Central Division, the title being Bessie Roth, Plaintiff, versus Will Mastin Trio, et al., Defendants?

Mr. Pollack: Yes.

Mr. Callaway: And can it further be stipulated that all questions that are propounded to the witness may be answered and that objections except as to the form of the question may be reserved until the time of the trial?

Mr. Pollack: Well, are you including or excluding such questions as I may instruct her not to answer?

Mr. Callaway: Only as to the form of the question. I'm trying to make this convenient for you and for your client. If I ask a question that you object as to the form, make it now so I will have an opportunity to change it. [3*]

Mr. Pollack: Yes, oh sure.

Mr. Callaway: All other objections——

Mr. Pollack: ——are saved for the time of trial.

Mr. Callaway: Yes. Is that so stipulated?

Mr. Pollack: That's right.

Mr. Callaway: And also it is stipulated that the testimony of the plaintiff may be taken and that there is no question about the notice as to time and place?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Bessie Roth.)

Mr. Pollack: That's correct.

Do you think we ought to have a further stipulation that this deposition be available for use in the other cases that are pending?

Mr. Callaway: So stipulated. In the State Courts you mean?

Mr. Pollack: Yes, and do you think that at the proper time we can describe those cases? They're all the cases now pending in the Superior Court of Los Angeles.

Mr. Callaway: Well, Mr. Bolton, do you want to read a description of them in the record? You have them there.

Mr. Pollack: Draw a separate stipulation which we will sign, but you will make a record of it that there is.

Mr. Bolton: The first case is titled Charles Head, Plaintiff, versus Helen S. Boss, Bessie Roth, Doe One [4] and Two, et al. The number is 637075, Los Angeles Superior Court. Then the case of Sammy Davis, Junior, Plaintiff, versus Helen S. Boss, et al., Los Angeles Superior Court number 637074.

I don't know whether I have the number of your case.

Mr. Callaway: Well, she has that. That's the principal case.

Mr. Pollack: What he means is he doesn't have the Superior Court number. We're taking this in the Bessie Roth case. He's talking about the Helen Boss case.

Mr. Callaway: Well, I have it.

(Deposition of Bessie Roth.)

Mr. Pollack: Anyway, we understand that it is all the cases that are pending between those parties and we also have a further stipulation that this stipulation shall not be construed as a consent to consolidate any of the cases pending in Superior Court.

Off the record.

(Discussion off the record.)

Mr. Callaway: I will stipulate that this will not be considered as a consent to consolidate.

Mr. Pollack: All right. I think we are ready to roll.

Mr. Callaway: That doesn't mean that I am not going to move to consolidate the cases.

Mr. Pollack: Not only that, but chances are [5] I will be perfectly willing that they be consolidated.

Mr. Callaway: I'm not trying to bind you by that.

Mr. Pollack: All right.

Direct Examination

By Mr. Callaway:

Q. Your name is Bessie Roth?

A. Yes, sir.

Q. Where do you reside, Mrs. Roth?

A. Akron, Ohio.

Q. And have you ever had your deposition taken before? A. No, sir. [6]

* * *

Q. All right. Now, be sure that if you don't understand my questions to tell me so, because I can always reframe them until you do understand.

(Deposition of Bessie Roth.)

Where do you live in Akron, Ohio?

A. 360 Parkwood Avenue.

Q. And how long have you lived there?

A. Well, I have lived there—I've been with this friend of mine——

Q. You do not need to give me any explanation. All [7] you need to tell me is how long you have lived there.

A. Six years.

Mr. Pollack: That is the way to answer the question. Just answer the question. Otherwise, we will never get through.

Q. (By Mr. Callaway): Let me ask you, when did you leave Akron?

A. The 15th of November.

Q. And what was your destination?

A. Los Angeles, California.

Q. When you left to come to California did you intend to return to Akron?

A. Yes, sir.

Q. When?

A. In the spring.

Q. And were you coming out here on business or on pleasure?

A. Oh, I intended to work here.

Q. In what line of work?

A. Practical nursing.

Q. How long did you intend to work?

A. Well, until about the 1st of May.

Q. Did you have any particular purpose for returning to Akron?

A. No.

Q. Well now, as I understand it, you came [8] out here with a Mrs. Boss?

A. Yes.

Q. Did you know here before you decided to leave Akron? A. No.

Q. And is it correct that you answered a newspaper advertisement? A. Yes, sir.

Q. One which she had put in one of the Akron papers that she was seeking passengers to California to share expenses with her? A. Yes.

* * *

[Endorsed]: Filed January 17, 1955. [9]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 29 inclusive, contain the original—

Complaint.

Answer to Complaint.

Verdict.

Judgment on Verdict.

Motion for New Trial.

Notice of Motion for Dismissal and to Vacate Judgment and Order Shortening Time.

Notice of Appeal;

Appellant's Statement of Points Upon Which She Intends to Rely.

Appellant's Designation.

which, together with a full, true and correct copy of the Minutes of the Court on Feb. 28, 1955; and 1

(Deposition of Bessie Roth.)

volume of Reporter's Transcript of proceedings had on Jan. 18 and 19, 1955; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 1st day of April, 1955.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14713. United States Court of Appeals for the Ninth Circuit. Bessie Roth, Appellant, vs. Sammy Davis, Jr., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 4, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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No. 14713

United States
Court of Appeals
for the Ninth Circuit.

BESSIE ROTH,

Appellant,

VS.

SAMMY DAVIS, JR.,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

OCT 26 1955

PAUL P. O'BRIEN, CLERK



No. 14713

United States
Court of Appeals
for the Ninth Circuit.

BESSIE ROTH,

Appellant,

vs.

SAMMY DAVIS, JR.,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.



United States District Court, Southern District of
California Central Division

No. 17,562-BH Civil

BESSIE ROTH,

vs.

WILL MASTIN TRIO, et al., (Does).

Present: Hon. Ben Harrison, District Judge;

Counsel for Plaintiff: Vivian M. Feld
and Wm. Jerome Pollack;

Counsel for Answering Defendants: Hu-
len C. Callaway and John S. Bolton for
answering defendants Will Masten,
Sammy Davis, Sr., and Sammy Davis,
Jr., a copartnership doing business under
the fictitious name of Will Masten Trio,
and Sammy Davis, Jr., individually.

MINUTES OF THE COURT—JAN. 20, 1955.

Proceedings:

For further jury trial. At 10:35 a.m., court
convenes herein, and the jury and alternate juror
being present,

Court makes a statement to the jurors relative to
defendants' copartnership. Attorney Pollack, for
plaintiff, moves that this cause be dismissed as to
defendants Will Masten, Sammy Davis, Sr., and
Sammy Davis, Jr., a copartnership doing business
under the fictitious name of Will Masten Trio.

Attorney Callaway states that defendants have no objection thereto and Court Orders this cause dismissed as to said copartnership, only, and the fictitious named defendants.

Attorney Pollock argues to the jury on behalf of plaintiff.

At 11 a.m., Attorney Callaway on behalf of Def't Sammy Davis, Jr., argues to the jury. At 11:28 a.m., Attorney Pollock argues to the jury in closing on behalf of plaintiff. At 11:40 a.m., Court makes a statement to the jury and admonishes the jurors not to discuss this cause, and declares a recess until 1:30 p.m., today.

At 1:30 p.m., court reconvenes herein, and all being present as before, including counsel for both sides and the jury and alternate juror;

Court makes a statement to the jury and instructs the jury on the law of this case, and at the conclusion thereof, at 2:05 p.m., pursuant to the Court's order, John M. Scheibe, bailiff, is sworn as the officer to take charge of the jury during its deliberations upon a verdict herein.

The Court excuses the alternate juror, Leona A. Murray, and she retires from the court room.

At 2:06 p.m., pursuant to the Court's order, the jury retires from the court room in charge of said officer heretofore sworn, and two blank forms of verdicts and all exhibits in evidence, except Plf's Ex. 2 (Deposition of Helen S. Boss), are given to the jury for their use in their deliberations.

The jury having retired from the court room, Attorney Pollack for plaintiff, makes a statement of exceptions to certain instructions of the court relative to an unavoidable accident. Exception is noted.

Attorney Callaway for defendant states he excepts to the failure of the Court to give certain requested instructions. Exception is noted.

Attorney Pollack makes a further statement. The Court makes a further statement. Attorney Callaway makes a further statement.

At 2:14 p.m., court recesses until the coming in of the jury.

At 4:25 p.m., pursuant to the court's order, Douglas Wikle is sworn as an officer to take charge of the jury during their deliberations in place of John M. Scheibe, who was heretofore sworn.

At 4:52 p.m., pursuant to the Court's order, Elizabeth Bazar, is sworn as additional officer to take charge of the jury during their deliberations.

At 5:25 p.m., the Court orders that the two officers heretofore sworn, Douglas Wikle and Elizabeth Bazar, take the jury to supper, the expense of the meals for the jury and the two bailiffs to be paid by U.S.A., and that when the jury have finished with their meals that they be returned by said officers to the jury room for their further deliberations upon a verdict herein.

At 7:00 p.m., the jury returns from supper in charge of said two officers heretofore sworn and retire to the jury room to deliberate upon its verdict herein.

At 8:30 p.m., the jury returns into court, and counsel being present as before, and the jury being present, court convenes.

The Court inquires of the jury if it has arrived at a verdict, and the jury through its foreman states that it has, and thereupon, pursuant to the Court's order.

The Verdict of the jury, finding in favor of defendant Sammy Davis, Jr., individually, is presented and read, and on motion of counsel for plaintiff, the jury is polled and each juror states that the verdict as presented and read is his verdict. Court Orders the verdict filed and entered, to wit: (See Verdict Following:)

The Court Orders the jury discharged herein, and orders the jurors excused from further jury service in this court until notified by the clerk.

The Court directs the clerk to prepare and present judgment on the verdict to the Court for its approval and signature.

At 8:35 p.m., court adjourns.

(A true copy.)

EDMUND L. SMITH,
Clerk,

By MURRAY E. WIRE,
Deputy Clerk.



No. 14713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BESSIE ROTH,

Plaintiff and Appellant,

vs.

SAMMY DAVIS, JR.,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF.

VIVIAN M. FELD,
WM. JEROME POLLACK,
6361 Wilshire Boulevard,
Los Angeles 48, California,
Attorneys for Appellant.

FILED

AUG -5 1975

PAUL P. O'BRIEN, CLERK



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No. 14713
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

BESSIE ROTH,

Plaintiff and Appellant,

vs.

SAMMY DAVIS, JR.,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts.

This is an action for personal injuries. The jury found in favor of defendant Sammy Davis, Jr. Motion for new trial and motion for dismissal and to vacate the judgment were denied. This is an appeal from the verdict and judgment in favor of said defendant and from the denial of plaintiff's motion to vacate said judgment and for leave to dismiss without prejudice.

Paragraph I of plaintiff's complaint alleges that

"defendants (Will Mastin Trio, Sammy Davis, Jr., Sammy Davis, Will Mastin, DOE I-X) are citizens and residents of the State of California, and that plaintiff is a citizen and resident of the State of Ohio."

The Doe defendants have not been dismissed out of and are still parties to the action.

Plaintiff Bessie Roth was riding as a passenger in a Chrysler automobile which was being operated in a southerly direction on Kendall Drive in San Bernardino Coun-

ty, State of California, about 9 miles north of San Bernardino, California. A 1954 Cadillac crashed into the rear of the Chrysler, causing plaintiff to suffer serious and permanent injuries. The driver of the Cadillac was the well-known night club entertainer, Sammy Davis, Jr. He admitted on deposition that for several miles he had been following the Chrysler, 3-4 car lengths behind it and finally crashed into it. At the trial he told a completely fantastic story: that the Chrysler pulled over to the right, off the road and then immediately and suddenly backed up across the highway into his path. Photographs introduced into evidence show that the damage to the Chrysler was all in the rear and that there was no damage to its side.

Defendant Sammy Davis, Jr. lost an eye in the accident. Obviously and because of the sympathy for Davis and because of his tremendous popularity as a night club entertainer the jury found in his favor, despite an instruction that if they found that Davis was negligent and that such negligence was approximate cause of the accident their verdict must be for the plaintiff. The verdict was a horrible miscarriage of justice but since the court denied the motion for new trial, we do not discuss that phase of the case.

This Appeal is brought under the authority of 28 U. S. C. 1291.

Statement of the Case and Question Involved.

The exact question presented by this appeal is now before this court in the case of *Molnar v. National Broadcasting Company, Inc.*, No. 14712, and is as follows:

WHERE A COMPLAINT NAMES CERTAIN UNKNOWN DEFENDANTS (DOES) AND ALLEGES THAT SAID UN-

KNOWN DEFENDANTS ARE CITIZENS AND RESIDENTS OF THE SAME STATE AS THE KNOWN, NAMED DEFENDANTS, WHICH STATE OF CITIZENSHIP AND RESIDENCE IS DIVERSE FROM THAT OF PLAINTIFF, DOES THE UNITED STATES DISTRICT COURT HAVE JURISDICTION OF THE CASE ON THE BASIS OF DIVERSITY OF CITIZENSHIP, ASSUMING THE AMOUNT IN CONTROVERSY TO BE IN EXCESS OF \$3000.00, EXCLUSIVE OF INTEREST AND COSTS?

In the *Molnar* case, Judge Mathes dismissed the action holding that complete diversity between the parties was not present and there was no jurisdiction over the subject matter. In the instant case Judge Harrison refused to dismiss the action or to vacate the judgment.

Specification of Errors Relied On.

The sole error complained of on this appeal is that the court erred in refusing to dismiss the action and vacate the judgment since the court had no jurisdiction over the subject matter.

Argument.

The allegations of the complaint in the *Molnar* case with regard to citizenship and residence of the Doe defendants are verbatim the same as those in the complaint in the instant case. With regard to those identical allegations, Judge Mathes held in the *Molnar* case:

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U. S. C., §1332; *Indianapolis v. Chase National Bank*, 314 U. S. 63, 69-70, 76-77 (1941); *Parker v. Overman*, 18 How. (59 U. S.) 137, 141 (1855);

Mullen v. Torrance, 9 Wheat. (22 U. S.) 537, 538 (1824)];

(2) that there is no claim or cause of action asserted in the complaint which “arises under the Constitution, laws or treaties of the United States” [28 U. S. C., §1331; Gully v. First National Bank, 299 U. S. 109, 112-114 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476, 483-484 (1933); Hooe v. United States, 218 U. S. 322, 335-336 (1910); Scribner v. Straus, 210 U. S. 352 (1908); Wade v. Lawder, 165 U. S. 624 (1897); Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46 (1888); Republic Pictures Corp. v. Security etc. Bank, 197 F. 2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8(a)(1), 28 U. S. C. A. 252 (1950)] do not affirmatively appear [Robertson v. Cease, 97 U. S. 646, 648-650 (1878); *Ex Parte* Smith, 94 U. S. 455, 456 (1876)], this court of limited jurisdiction [Shamrock Oil Co. v. Sheets, 313 U. S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [Bors v. Preston, 111 U. S. 252, 255 (1884); Grace v. American Central Ins. Co., 109 U. S. 278 (1883); Turner v. Bank of North America, 4 Dall. (4 U. S.) 7, 11 (1800); New York Life Ins. Co. v. Kaufman, 78 F. 2d 398, 400 (9th Cir. 1935)];

It is Ordered upon the Court’s own initiative [Fed. Rules Civ. Proc. Rule 12(h), 28 U. S. C. A.] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U. S. C. A.].

It is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U. S. C. A.].

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

February 10, 1955.

Wm. C. Mathes

United States District Judge

Endorsed: Filed Feb. 11, 1955. Edmund L. Smith, Clerk;
by C. A. Simmons, Deputy Clerk.

Judgment Docketed and Entered Feb. 11, 1955, Edmund
L. Smith, Clerk; by C. A. Simmons, Deputy Clerk.

Conclusion.

Under the foregoing authorities it is urged that the court never had jurisdiction over the subject matter in this case and that, therefore, plaintiff's motion for leave to dismiss and to vacate the judgment should have been and should be granted.

Respectfully submitted,

VIVIAN M. FELD,

WM. JEROME POLLACK,

Attorneys for Appellant.



No. 14713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BESSIE ROTH,

Plaintiff and Appellant,

vs.

SAMMY DAVIS, JR.,

Defendant and Appellee.

APPELLEE'S REPLY BRIEF.

HULEN C. CALLAWAY,
JOHN S. BOLTON,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Appellee.

FILED

SEP - 7 1957

HULEN C. CALLAWAY,
Of Counsel,

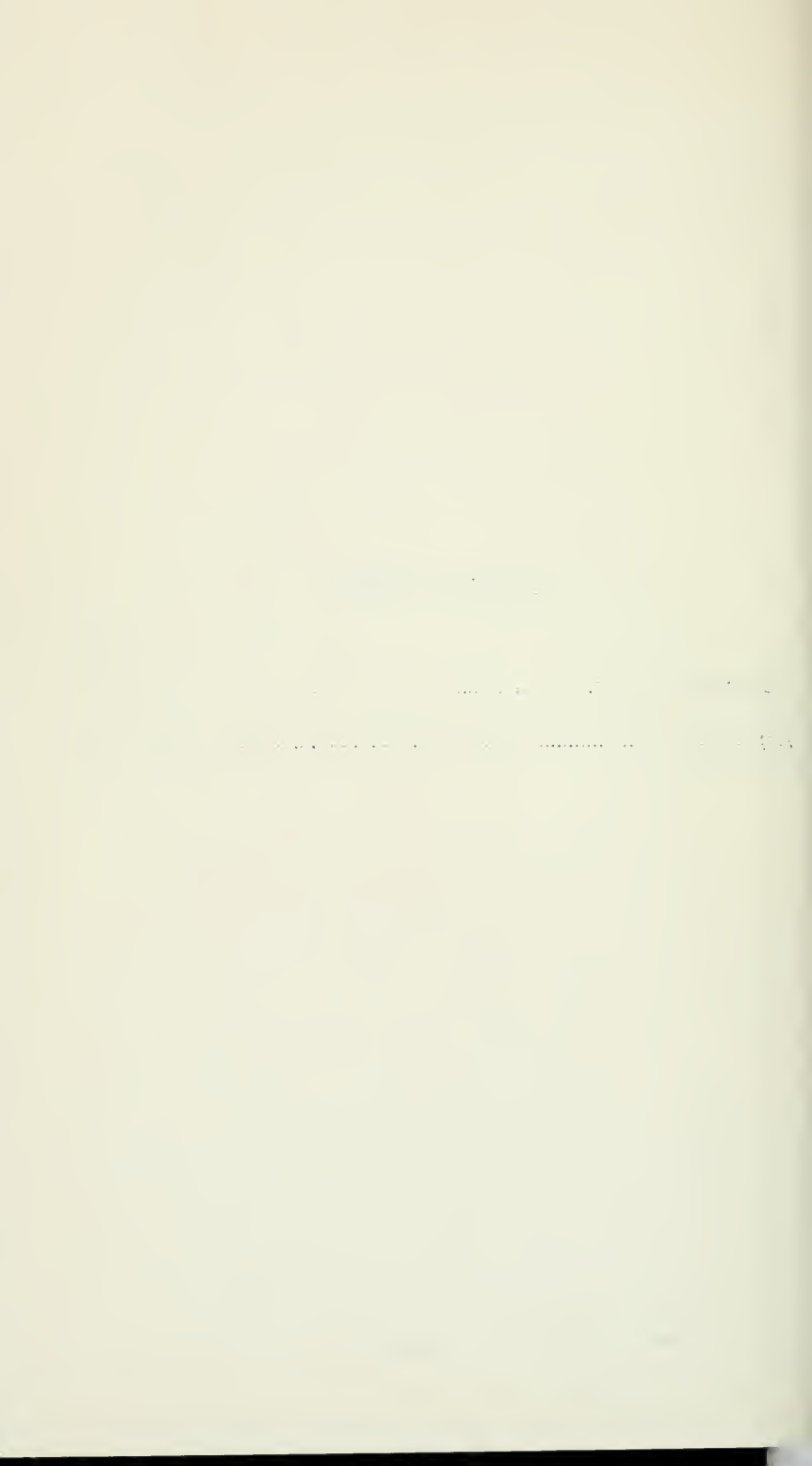
PAUL P. O'BRIEN, CLERK



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No. 14713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BESSIE ROTH,

Plaintiff and Appellant,

vs.

SAMMY DAVIS, JR.,

Defendant and Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Facts.

This case involves the single question of whether or not the United States District Court had jurisdiction where certain fictitious defendants were named but were not served and did not appear and were actually dismissed by the District Court on motion of the Appellant before the conclusion of the trial.

The Appellant's complaint alleges in paragraph III as follows:

"The true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe I-X are unknown to plaintiff, who therefore sues said defendants by such fictitious names. When the true names, identities or capacities of such fictitiously designated defendants are ascertained, plaintiff will ask leave of court to amend this complaint to insert said true names, identities or capacities, together with the proper charging allegations . . ."

No fictitious defendant was ever served or appeared in the action. At the conclusion of all the testimony on January 20, 1955, appellant made a motion in the District Court, to which no objection was made, to dismiss the cause as to certain named defendants. This motion was granted and the court at the same time dismissed the cause as to all fictitious defendants. The proceedings had, as will appear from the clerk's minutes dated January 20, 1955 in the supplement to the transcript of record on appeal filed here, are as follows: "Attorney Pollack for the plaintiff moves that this cause be dismissed as to the defendants Will Mastin, Sammy Davis, Sr. and Sammy Davis, Jr., a copartnership doing business under the fictitious firm name of Will Mastin Trio. Attorney Callaway states that defendants have no objection thereto and the court ordered this cause dismissed as to said copartnership only and the fictitious named defendants."

In view of the foregoing it is appalling that appellant would make a statement on the first page of her opening brief that "The Doe defendants have not been dismissed out of and are still parties to the action."

Argument.

As to whether or not the reasoning in the decision of *Molnar v. National Broadcasting Company, Inc.*, which is a decision by a District judge, is sound or not becomes moot in view of the fact that the Appellant invoked the jurisdiction of the District Court by alleging diversity of citizenship between Bessie Roth, the plaintiff, and Sammy Davis, Jr., a defendant, the principal actors in the case and now, being dissatisfied with the result of the litigation in the District Court, makes the claim that jurisdic-

tion was not properly lodged in the first instance. It will be noted that the citizenship of the so-called Doe defendants was not stated in the pleadings and factually the evidence clearly shows that there is no fictitious defendant against whom a recovery could be had by appellant.

Under Rule 21 the court had the authority to dispose of these fictitious defendants after the evidence was all in since no fictitious defendant had been served or appeared. The pertinent portion of the rule is "parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just." And also under Rule 41(b) see: *Hicks v. Bekins Moving and Storage Co.* (C. C. A. 9th, 1940), 115 F. 2d 406.

All the cases cited by the appellant, as transposed from the *Molnar* decision, are not in point and would not support appellant's position if the fictitious defendants had not been dismissed in the District Court before the conclusion of the proceedings there. It therefore appears that further argument by the appellee would be superfluous and the appeal should be dismissed.

Respectfully submitted,

HULEN C. CALLAWAY,

JOHN S. BOLTON,

Attorneys for Appellee.

HULEN C. CALLAWAY,

Of Counsel.



No. 14716

United States
Court of Appeals
for the Ninth Circuit

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. PRESS, Officer in Charge,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Southern Division

FILED

JUN 20 1955



No. 14716

United States
Court of Appeals
for the Ninth Circuit

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. PRESS, Officer in Charge,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee:

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U. S. Attorney;

MAX F. DEUTZ,

ANDREW J. DAVIS,

Assistants U. S. Attorney,

600 Federal Bldg.,

Los Angeles 12, Calif.



In the United States District Court in and for the
Southern District of California, Southern Division

No. 1722-Civ. S.D.

In the Matter of the Application of:
JESUS GARCIA for a Writ of Habeas Corpus.

PETITION FOR A WRIT OF
HABEAS CORPUS

The petition of Jesus Garcia for a Writ of Habeas Corpus, respectively shows that:

I.

That petitioner was born on June 2, 1924, in San Diego, California, and was a citizen of the United States by birth.

II.

That petitioner is now in Tijuana, Baja California, Mexico, and claims that he is still a citizen of the United States and has a right to enter the United States by reason thereof and that such right has been denied by the United States Department of Justice, Immigration and Naturalization Service and the Officials thereof upon the ground that he is not a National of the United States.

III.

That in 1932, petitioner was taken to Mexico by his parents, where he remained until 1946. At which time he re-entered the United States as a citizen thereof.

IV.

That in 1947, petitioner went to Tijuana, Mexico, to see his [2*] mother and on September 16, 1947, a Board of Special Inquiry excluded the petitioner on the ground that he had forfeited his United States citizenship under Section 401(j) of the Nationality Act of 1940, as amended, by remaining outside the United States subsequent to September 27, 1944, until June, 1946, for the purpose of evading or avoiding training or service of the Armed Forces of the United States. The aforesaid hearing was unfair in that said hearing contained statements which were untrue and statements that were not made by petitioner herein and petitioner did not remain outside the United States for said purpose.

V.

That subsequent thereto, petitioner entered the United States as a citizen and remained until just prior to his application for admission at San Ysidro, on March 7, 1954.

VI.

That on April 6, 1954, a Special Inquiry Officer at San Ysidro, California, excluded the applicant from admission to the United States. That said decision was based in part on the aforesaid unfair hearing in 1947. That petitioner appealed from the decision of the Special Inquiry Officer and the decision of the Special Inquiry Officer was upheld by the Board of Immigration Appeals and that the said

*Page numbering appearing at foot of page of original Certified Transcript of Record.

decision of the Board of Immigration Appeals was also based upon the decision in 1947. That a final determination by the Attorney General has now been made, that petitioner is not entitled to admission to the United States.

VII.

That petitioner is unlawfully detained and restrained of his liberty by Albert Del Guercio, as Acting District Director of Immigration and Naturalization Service, Los Angeles, California; U. L. Press, as Officer in Charge, San Ysidro, California, and each and all of their agents and servants within the jurisdiction of this Court for the reason that your petitioner was a citizen of the United States by birth and is still a citizen of the [3] United States; that the hearing granted petitioner was unfair; that petitioner has a right to enter the United States; that said right has been denied by defendants, and each of them, who unlawfully restrain and detain petitioner and refuse him admittance at the port of San Ysidro, California.

Wherefore, your petitioner prays that a Writ of Habeas Corpus be issued out of this Court directed to Albert Del Guercio, as Acting District Director; U. L. Press, as Officer in Charge, and each and all of their agents and servants, requiring them, and each of them to bring before this Court forthwith the body of Jesus Garcia to do and receive what the Court then and there considers and then and there to show cause, if any they may have, for restraining and detaining Jesus Garcia.

Your petitioner further prays that the Court may

determine the legality of the restraint and detention of said Jesus Garcia and thereupon dispose of the case as law and justice may require.

/s/ JESUS A. GARCIA,

SWEET, AULT & WARNER,

By /s/ VERNE O. WARNER,

Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed February 17, 1955. [4]

[Title of District Court and Cause.]

PROPOSED ORDER TO SHOW CAUSE

Good cause appearing therefore, and upon reading the verified Petition on file herein;

It Is Hereby Ordered that the defendant, U. L. Press, appear before this court on the day of February, 1955, at 10:00 o'clock in the forenoon, to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said U. L. Press, Officer in Charge, San Ysidro, California, and that a copy of this order and a copy of the Petition be served upon the Assistant United States Attorney, his representative herein.

Dated: February, 1955.

.....,

Judge of the United States
District Court.

Order Denying Petition

It does not appear from the petition that the petitioner is committed, imprisoned or detained by anyone, or in the custody of anyone so as to authorize the issuance of a Writ of Habeas Corpus or an order to show cause therefor, under 28 USC, 2241, et seq.

It is therefore hereby ordered that the petition for the writ or for an order to show cause therefor is denied, and the case is dismissed.

Dated at San Diego, California, February 18, 1955.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed February 18, 1955. [6]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jesus Garcia, applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying the Petition for a Writ of Habeas Corpus and the Order to Show Cause therefor entered in this action on February 18, 1955.

SWEET, AULT & WARNER,

By /s/ VERNE O. WARNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1955. [7]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant herewith presents the points upon which he claims the court erred:

1. In denying appellant's request for an Order to Show Cause.
2. In denying appellant's Petition for a Writ of Habeas Corpus.
3. In dismissing case on ground appellant was not in custody.

SWEET, AULT & WARNER,
By /s/ VERNE O. WARNER,
Attorneys for Appellant.

[Endorsed]: Filed March 25, 1955. [9]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 11, inclusive, contain the original:

Petition for a Writ of Habeas Corpus;

Order Denying Petition;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Record on Appeal.

All in said cause, which constitute the transcript

of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 6th day of April, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14716. United States Court of Appeals for the Ninth Circuit. Jesus Garcia, Appellant, vs. Albert Del Guercio, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. Press, Officer in Charge, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed April 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14716

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, etc., et al.,

Defendants.

STATEMENT ON POINTS ON APPEAL AND
DESIGNATION OF RECORD

Appellant in the above-entitled cause hereby adopts as his statement of points on which he intends to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellant further adopts the designation of record as it now appears in the transcript of the record herein.

SWEET, AULT & WARNER,

By /s/ VERNE O. WARNER,

Attorneys for Appellant.

[Endorsed]: Filed April 21, 1955.

No. 14716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and
U. L. PRESS, Officer in Charge,

Appellees.

BRIEF FOR APPELLEES.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ANDREW J. DAVIS,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

AUG 13 1955

PAUL P. O'BRIEN, CLERK

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No. 14716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and
U. L. PRESS, Officer in Charge,

Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

This appeal is taken from the Order of the District Court dismissing appellant's "Petition For A Writ of Habeas Corpus" [Tr. 3-6] which was made and filed February 18, 1955 [Tr. 7].

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C., Secs. 1291 and 2253, there being no dispute that the Order of the District Court dismissing appellant's Petition was a final Order.

Statutes Involved.

Section 360 of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1503) reads as follows:

“§ 1503. Denial of rights and privileges as national—Proceedings for declaration of United States nationality.

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

Application for certificate of identity; appeal.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national

of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

Application for admission to United States under certificate of identity; revision of determination.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission

to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States. June 27, 1952, c. 477, Title III, ch. 3, § 360, 66 Stat. 273.

Title 28, § 2241 provides in part as follows:

(c) The Writ of Habeas Corpus shall not extend to a prisoner unless

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;”

Statement of the Case.

The Petition for Writ of Habeas Corpus was filed by the appellant in the District Court on February 17, 1955 [Tr. 3-5] on the same date appellant presented to the Court a proposed Order to Show Cause which was not issued due to the fact that it appeared to the Court there was no jurisdiction for the action. On February 18, 1955, the District Judge filed an Order denying the Petition for a Writ of Habeas Corpus [Tr. 7] which recited that said Petition would be denied due to the fact that the appellant was not in custody as required by Title 28 U. S. C., Sec. 2241 *et seq.* Thereafter, appellant filed Notice of Appeal on February 28, 1955.

ARGUMENT.

I.

Summary.

Appellees contend that the Petition for Writ of Habeas Corpus filed by appellant disclosed that appellant was not in custody or detained by themselves or anyone under their authority. In fact, the Petition alleges that appellant was in Tijuana, Baja, California, Mexico, at the time the Petition was filed. Appellees contend further that habeas corpus proceedings will only apply when the petitioner is in custody and since appellant was not in custody, the Petition was properly dismissed.

Appellant claims that Congress has changed the requirements of habeas corpus proceedings by enacting Sections 360(b) and 360(c) of the Immigration and Nationality Act of 1952. The change, appellant contends, is that custody of the petitioner is no longer necessary. However, it does not appear that Congress contemplated any change in habeas corpus proceedings and that it intended that custody would still be required.

In this particular case, even if it were assumed for argument that custody was no longer necessary, the petition would still fail to allege the necessary jurisdictional facts to bring appellant within the jurisdiction of the District Court. The statute, Section 360(c) of the 1952 Act, requires that an application for a certificate of identity be made before a diplomatic or consular officer of the United States. If the application is denied, such denial may be appealed to the Secretary of State. If the application is granted the person then applies for admission to the United States. If he is denied admission by the Attorney General at that time, he may then initiate

habeas corpus proceedings to review the immigration proceedings. The Petition failed to allege that appellant had applied for a Certificate of Identity as required by the statute and therefore failed to allege the jurisdictional requirements. It is clear that appellant has not exhausted his administrative remedies.

II.

Appellant's Petition Disclosed That Appellant Was Not in Custody and Therefore Habeas Corpus Did Not Lie.

Paragraph II of the Petition [Tr. 3] recites in part as follows:

“That petitioner is now in Tijuana, Baja, California, Mexico, and claims that he is still a citizen of the United States . . .”

This allegation clearly discloses that appellant was not in the United States and was not in the custody of any officer or official of the Government. The Order Denying Petition [Tr. 7] recites that the petitioner was not in custody and that the order to show cause would therefore be denied and the Petition dismissed.

Under the above circumstances, a writ of habeas corpus will not lie, since such a writ is designed solely to determine the legality of detention. Habeas corpus may not be sought to test the legality of detention at some future time.

Pope v. Huff (C. C. A., D. C., 1940), 117 F. 2d 779;

Rowland v. Arkansas (C. C. A. 8, 1950), 179 F. 2d 709;

28 U. S. C. 2241.

Without restraint of liberty the writ of habeas corpus will not issue.

McNally v. Hill, 293 U. S. 131, 138, 55 S. Ct. 24, 27, 79 L. Ed. 238;

Stalling v. Splain, 253 U. S. 399, 40 S. Ct. 537, 64 L. Ed. 940;

Johnson v. Boy, 227 U. S. 245, 33 S. Ct. 240, 57 L. Ed. 497;

Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

In the *Rowland* case, *supra*, the Court pointed out that the habeas corpus section, Section 2241 of Title 28, U. S. Code, requires “custody” in order for a Writ of Habeas Corpus to issue.

III.

The Allegations of Appellant’s Petition Disclosed That the District Court Was Without Jurisdiction Under the Provisions of Section 360 of the Immigration and Nationality Act of 1952.

A. Section 360(c) of the Immigration and Nationality Act Does Not Confer Jurisdiction Upon the District Court in This Case as the Appellant Was Not in Custody.

Section 360(c) of the Act of 1952 is set forth above. The pertinent portion of the statute is quoted as follows:

“A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise.”

The appellant’s Petition did not recite under what statute the action was brought. Apparently however, the Petition attempted to invoke jurisdiction under Section

360(c). The remedy provided in that section is by habeas corpus proceedings and not otherwise. Since there is nothing to indicate Congress intended to change the previously existing concept of habeas corpus requiring custody, the discussion above in reference to requirements for habeas corpus would apply.

Appellant claims that Congress can alter or change the common law concept of habeas corpus and that they in fact intended to do so when enacting Section 360(c). Appellant cites the cases of *D'Argento v. Dulles*, 113 Fed. Supp. 933; *United States v. Shaughnessy*, 118 Fed. Supp. 490, and *Nevarez v. Brownell*, 218 F. 2d 575, as supporting his contention.

In the *D'Argento* case the Court decided that the Immigration and Nationality Act of 1952 prevented a declaratory judgment action to determine nationality when a right or privilege as a national was denied outside the United States. The Court said at 113 Fed. Supp. 933, 935, that such actions were prevented:

“except as such question, and those properly relating thereto, may be raised and adjudicated in a habeas corpus proceeding under the conditions stated in the statute;”.

The Court did not indicate that the requirements of habeas corpus as to custody had been charged or that it had been the intent of Congress to change such requirements.

The case of *United States v. Shaughnessy*, *supra*, concerned a motion to dismiss a declaratory judgment action filed before the expiration of the Immigration and Nationality Act of 1940. The Court indicated that habeas corpus would be the plaintiff's only remedy under the

1952 Act but did not indicate that any different concept of habeas corpus was to be applied under the 1952 Act.

In *Nevares v. Brownell*, *supra*, the Court held only that habeas corpus was the appropriate remedy but again did not indicate that any changes had been made in the previously existing concept of habeas corpus. The Court did not discuss the question of custody at all.

B. Appellant's Petition Failed to Allege That Administrative Remedies Had Been Exhausted.

There are no presumptions in favor of the jurisdiction of Courts of the United States. (*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876).) One seeking the exercise of federal jurisdiction in his favor must allege in his pleading facts essential to show jurisdiction, and if he fails to make the necessary allegations, he has no standing in Court.

Rule 8(a)(1), Fed. Rules Civ. Proc., 28 U. S. C. A.;

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189 (1936);

Hanford v. Davis, 163 U. S. 273 (1896);

Engel v. Tribune Co., 189 F. 2d 177 (C. A. 7, 1951);

Joy v. Hague, 175 F. 2d 395 (C. A. 1, 1949), cert. den. 338 U. S. 870;

Alexander v. Westgate-Greenland Oil Co., 111 F. 2d 769, 770 (C. C. A. 9, 1940);

Royal Service Corp. v. City of Los Angeles, 98 F. 2d 551, 554 (C. C. A. 9, 1938).

The foregoing principle, well established in all cases where federal jurisdiction is claimed, applies to habeas corpus proceedings.

Dorsey v. Gill, 148 F. 2d 857, cert. den. 65 S. Ct. 1580, 325 U. S. 890, 89 L. Ed. 2003 (App. D. C., 1945).

Appellant's Petition omitted jurisdictional allegations necessary to bring him within the purview of Section 360(c) of the Immigration and Nationality Act of 1952. The Petition contains no averment that he had ever applied for a Certificate of Identity as required by Sections 360(b) and 360(c) of the state. This is an administrative remedy which must be exhausted. Even assuming, *arguendo*, that Congress did intend to change the concept of habeas corpus requiring custody and detention, then the Petition still failed for want of jurisdiction due to the fact that it failed to aver the exhaustion of administrative remedies. Clearly, under the statute, application for a certificate of identity and the appeal of a denial of that application to the Secretary of State in the event it should be denied are jurisdictional conditions which must be alleged.

Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938);

Samanrego v. Brownell, 212 F. 2d 891 (C. C. A. 5, 1954);

Avina v. Brownell, 112 Fed. Supp. 15 (D. C. Tex., 1953).

It is submitted therefore, that by reason of appellant's failure to include in his Petition the aforementioned allegations, the District Court did not acquire jurisdiction under the provisions of Section 360(c) of the Immigra-

tion and Nationality Act of 1952. Further, it was not necessary for a return to be filed before dismissal as the Petition itself revealed the defects described above. (*Higgins v. Steele*, 195 F. 2d 366 (C. A. 8, 1952); *Bowe v. Skeen*, 107 Fed. Supp. 879 (D. C. W. Va., 1952).)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court, dismissing appellant's Petition for a Writ of Habeas Corpus and Denying his Order to Show Cause, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division,

ANDREW J. DAVIS,

Assistant U. S. Attorney,

Attorneys for Appellee.

No. 14717

**United States
Court of Appeals**
for the Ninth Circuit.

VINCENTE RAMOS-RIVERA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. PRESS, Officer in Charge,

Appellee.

Transcript of Record

**Appeal from the United States District Court
Southern District of California
Southern Division**

FILED

JUN 20 1955

No. 14717

United States
Court of Appeals
for the Ninth Circuit.

VINCENTE RAMOS-RIVERA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. PRESS, Officer in Charge,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SWEET, AULT & WARNER,

530 Broadway, Suite 1110,
San Diego 1, Calif.

For Appellees:

LAUGHLIN E. WATERS,

U. S. Attorney;

MAX F. DEUTZ,

ANDREW J. DAVIS,

Assistants U. S. Attorney,

600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for
the Southern District of California, Southern
Division

No. 1720-Civ. S.D.

No. 1611-10634 L.A.

In the Matter of the Application of:

VINCENTE RAMOS-RIVERA for a Writ of
Habeas Corpus.

PETITION FOR WRIT OF
HABEAS CORPUS

The petition of Vincente Ramos-Rivera for a
Writ of Habeas Corpus respectfully shows:

I.

That on January 3, 1942, petitioner was granted
United States citizenship by the Superior Court of
the State of California, in and for the County of
San Diego.

II.

That petitioner has worked in San Diego, Cali-
fornia, continuously since July 3, 1936, up to the
present time.

III.

That since 1947 petitioner has maintained a home
in Tijuana, Mexico, for the purpose of caring for
his children and has crossed the border daily to
work at his occupation.

IV.

That petitioner sought the advice of the American

Consulate in Tijuana, Mexico, as to whether or not said arrangement would affect his citizenship and was advised that as long as he crossed daily to work, he would not lose any rights of citizenship in the United States. [2*]

V.

That on September 1, 1954, petitioner applied for admission at San Ysidro, California, and was held for a hearing before a Special Inquiry Officer. That on September 21, 1954, the Special Inquiry Officer ordered that petitioner be admitted as a citizen of the United States. That the Officer in Charge of San Ysidro, California, appealed from this decision. That on December 17, 1954, the Board of Immigration Appeals sustained the Appeal of the Officer in Charge and ordered petitioner excluded from the United States.

VI.

That petitioner claims that he has not lost his United States citizenship and that he has a right to enter the United States and that he has been denied such a right and privilege by the United States Department of Justice, Immigration and Naturalization Service and by the Officials thereof, upon the ground that he is not a National of the United States.

VII.

That petitioner has been and now is unlawfully and forceably restrained of his liberty by Albert Del Guercio, Acting District Director of Immigration and Naturalization, Los Angeles, California, and

U. L. Press as Officer in Charge, San Ysidro, California, and each and all of their agents and servants within the jurisdiction of this Court.

Wherefore, your petitioner prays that a Writ of Habeas Corpus be issued out of this Court, directed to Albert Del Guercio, as District Director and U. L. Press, as Officer in Charge, and each and all of their agents and servants, requiring them, and each of them to bring before this court forthwith, the body of Vincente Ramos-Rivera to do and receive what the Court then and there considers and then and there to show cause, if any they may have, for restraining and detaining Vincente Ramos-Rivera.

Your petitioner further prays that the Court may determine the [3] legality of the restraint and detention of said Vincente Ramos-Rivera and thereupon dispose of the case as law and justice may require.

SWEET, AULT & WARNER,
By /s/ VERNE O. WARNER,
/s/ VINCENTE RAMOS-RIVERA.

Duly verified.

[Endorsed]: Filed February 17, 1955. [4]

[Title of District Court and Cause.]

PROPOSED ORDER TO SHOW CAUSE

Good cause appearing therefore, and upon reading the verified Petition on file herein;

It Is Hereby Ordered that the defendant, U. L.

Press, appear before this Court on the day of February, 1955, at 10:00 o'clock in the forenoon, to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said U. L. Press, Officer in Charge, San Ysidro, California, and that a copy of this order and a copy of the Petition be served upon the Assistant United States Attorney, his representative herein.

Dated: February, 1955.

.....,
Judge of the United States
District Court.

Order Denying Petition, etc.

It does not appear from the petition that petitioner is committed, imprisoned or detained by anyone, or is in the custody of anyone, so as to authorize the issuance of a Writ of Habeas Corpus or an order to show cause therefor under the provisions of Title 28, U.S.C. 2241, et seq.

It is therefore hereby ordered that the petition for the writ or the order to show cause therefor is denied, and the case is dismissed.

Dated: San Diego, Calif., Feb. 18th, 1955.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed February 18, 1955. [5]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Vincente Ramos-Rivera, applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying the Petition for a Writ of Habeas Corpus and the Order to Show Cause therefor entered in this action on February 18, 1955.

SWEET, AULT & WARNER,
By /s/ VERNE O. WARNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1955. [6]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant herewith presents the points upon which he claims the Court erred:

1. In denying appellant's request for an Order to Show Cause.
2. In denying appellant's Petition for a Writ of Habeas Corpus.
3. In dismissing the case on ground appellant was not in custody.

SWEET, AULT & WARNER,
By /s/ VERNE O. WARNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1955. [8]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 10, inclusive, contain the original:

Petition for Writ of Habeas Corpus;

Order Denying Petition;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Record on Appeal;

in the above-entitled cause, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 6th day of April, 1955.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14717. United States Court of Appeals for the Ninth Circuit. *Vincente Ramos-Rivera*, Appellant, vs. *Albert Del Guercio*, Acting District Director of Immigration and Naturalization Service, Los Angeles, and *U. L. Press*, Officer in Charge, Appellee. Transcript of Record. Appeal

from the United States District Court for the Southern District of California, Southern Division.

Filed April 7, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14717

VINCENTE RAMOS-RIVERA,

Appellant,

vs.

ALBERT DEL GUERCIO, etc., et al.,

Defendants.

STATEMENT ON POINTS ON APPEAL AND
DESIGNATION OF RECORD

Appellant in the above-entitled cause hereby adopts as his statement of points on which he intends to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellant further adopts the designation of record as it now appears in the transcript of the record herein.

SWEET, AULT & WARNER,

By /s/ VERNE O. WARNER,

Attorneys for Appellant.

[Endorsed]: Filed April 21, 1955.

No. 14717

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VINCENTE RAMOS-RIVERA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and
U .L. PRESS, Officer in Charge,

Appellee.

BRIEF FOR APPELLEES.

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Chief of Civil Division,

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FILED

AUG 13 1955

PAUL P. O'BRIEN, CLERK

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No. 14717
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VINCENTE RAMOS-RIVERA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and
U .L. PRESS, Officer in Charge,

Appellee.

BRIEF FOR APPELLEES.

Jurisdiction.

This appeal is taken from the Order of the District Court dismissing appellant's "Petition For a Writ of Habeas Corpus" [Tr. 3-5] which was made and filed February 18, 1955. [Tr. 6.]

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C. 1291 and 2253, there being no dispute that the Order of the District Court dismissing appellant's Petition was a final Order.

Statutes Involved.

Section 360 of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1503) reads as follows:

“§1503. Denial of rights and privileges as national
Proceedings for declaration of United States nationality.

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

Application for certificate of identity; appeal.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a

national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

Application for admission to United States under certificate of identity; revision of determination.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b) of his section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described

in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States. June 27, 1952, c. 477, Title III, ch. 3, §360, 66 Stat. 273.”

Title 28, Section 2241 provides in part as follows:

“(c) The Writ of Habeas Corpus shall not extend to a prisoner unless

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;”.

Statement of the Case.

The Petition for Writ of Habeas Corpus was filed by the appellant in the District Court on February 17, 1955 [Tr. 3-5] on the same date appellant presented to the Court a proposed Order to Show Cause which was not issued due to the fact that it appeared to the Court there was no jurisdiction for the action. On February 18, 1955, the District Judge filed an Order denying the Petition for a Writ of Habeas Corpus [Tr. 6] which recited that said Petition would be denied due to the fact that the appellant was not in custody as required by Title 28 U. S. C., Sec. 2241 *et seq.* Thereafter, appellant filed Notice of Appeal on February 28, 1955.

ARGUMENT.

I.

Summary.

Appellees contend that the Petition for Writ of Habeas Corpus filed by appellant disclosed that appellant was not in custody or detained by themselves or anyone under their authority. In fact, the Opening Brief of Appellant at page 2 admits that appellant is not in the United States and that he had been denied admission when the Petition was filed. Appellees contend further that habeas corpus proceedings will only apply when the petitioner is in custody and since appellant was not in custody, the Petition was properly dismissed.

Appellant claims that Congress has changed the requirements of habeas corpus proceedings by enacting Sections 360(b) and 360(c) of the Immigration and Nationality Act of 1952. The change, appellant contends, is that custody of the petitioner is no longer necessary. However, it does not appear that Congress contemplated any change in habeas corpus proceedings and that it intended that custody would still be required.

In this particular case, even if it were assumed for argument that custody was no longer necessary, the Petition would still fail to allege the necessary jurisdictional facts to bring appellant within the jurisdiction of the District Court. The statute, Section 360(c) of the 1952 Act, requires that an application for a certificate of identity be made before a diplomatic or consular officer of the United States. If the application is denied, such denial may be appealed to the Secretary of State. If the application is granted the person then applies for admission to the United States. If he is denied admission by the At-

torney General at that time, he may then initiate habeas corpus proceedings to review the immigration proceedings. The Petition failed to allege that appellant had applied for a Certificate of Identity as required by the statute and therefore failed to allege the jurisdictional requirements. It is clear that appellant has not exhausted his administrative remedies.

II.

Appellant's Petition Discloses That Appellant Was Not in Custody and Therefore Habeas Corpus Did Not Lie.

Paragraph VII of appellant's Petition for Writ of Habeas Corpus alleges in part as follows [Tr. 4-5]:

"That petitioner has been and now is unlawfully and forcibly restrained of his liberty by Albert Del Guercio, Acting District Director of Immigration and Naturalization, Los Angeles, California, and U. L. Press as Officer in Charge, San Ysidro, California, and each and all of their agents and servants within the jurisdiction of this Court." (Emphasis added.)

The above paragraph is the only allegation in the Petition referring to custody other than statements contained in the prayer of the Petition. The allegations contained in Paragraph VII are conclusions of law and raise no issue.

Cuddy, Petitioner, 9 S. Ct. 703, 131 U. S. 280, 33 L. Ed. 154 (1889).

Further, paragraphs II and III of the Petition [Tr. 3] indicate that the appellant was not in custody at the

time the Petition was filed. The Order Denying Petition [Tr. 6] recites that petitioner was not in custody and that fact is not challenged by appellant but, in fact, admitted in his Opening Brief (Op. Br. 2) when he states appellees refuse him admittance to the United States.

Under the above circumstances, a writ of habeas corpus will not lie, since such a writ is designed solely to determine the legality of detention. Habeas corpus may not be sought to test the legality of detention at some future time.

Pope v. Hill (C. C. A., D. C., 1940), 117 F. 2d 779;

Rowland v. Arkansas (C. C. A. 8, 1950), 179 F. 2d 709;

28 U. S. C. 2241.

Without restraint of liberty the writ of habeas corpus will not issue.

McNally v. Hill, 293 U. S. 131, 138, 55 S. Ct. 24, 27, 79 L. Ed. 238;

Stalling v. Splain, 253 U. S. 399, 40 S. Ct. 537, 64 L. Ed. 940;

Johnson v. Boy, 227 U. S. 245, 33 S. Ct. 240, 57 L. Ed. 497;

Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

In the *Rowland* case, *supra*, the Court pointed out that the habeas corpus section, Section 2241 of Title 28, U. S. Code, requires "custody" in order for a Writ of Habeas Corpus to issue.

III.

The Allegations of Appellant's Petition Disclosed That the District Court Was Without Jurisdiction Under the Provisions of Section 360 of the Immigration and Nationality Act of 1952.

- A. Section 360(c) of the Immigration and Nationality Act Does Not Confer Jurisdiction Upon the District Court in This Case as the Appellant Was Not in Custody.

Section 360(c) of the Act of 1952 is set forth above. The pertinent portion of the statute is quoted as follows:

"A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

The appellant's Petition did not recite under what statute the action was brought. Apparently however, the Petition attempted to invoke jurisdiction under Section 360(c). The remedy provided in that section is by habeas corpus proceedings and not otherwise. Since there is nothing to indicate Congress intended to change the previously existing concept of habeas corpus requiring custody, the discussion above in reference to requirements for habeas corpus would apply.

Appellant claims that Congress can alter or change the common law concept of habeas corpus and that they in fact intended to do so when enacting Section 360(c). Appellant cites the cases of *D'Argento v. Dulles*, 113 Fed. Supp. 933; *United States v. Shaughnessy*, 118 Fed. Supp. 490, and *Nevarez v. Brownell*, 218 F. 2d 575 as supporting his contention.

In the *D'Argento* case the Court decided that the Immigration and Nationality Act of 1952 prevented a declara-

tory judgment action to determine nationality when a right or privilege as a national was denied outside the United States. The Court said at 113 Fed. Supp. 933, 935, that such actions were prevented:

“except as such question, and those properly relating thereto, may be raised and adjudicated in a habeas corpus proceeding under the conditions stated in the statute;”.

The court did not indicate that the requirements of habeas corpus as to custody had been changed or that it had been the intent of Congress to change such requirements.

The case of *United States v. Shaughnessy*, *supra*, concerned a motion to dismiss a declaratory judgment action filed before the expiration of the Immigration and Nationality Act of 1940. The Court indicated that habeas corpus would be the plaintiff's only remedy under the 1952 Act but did not indicate that any different concept of habeas corpus was to be applied under the 1952 Act.

In the *Nevarez v. Brownell*, *supra*, the Court held only that habeas corpus was the appropriate remedy but again did not indicate that any changes had been made in the previously existing concept of habeas corpus. The Court did not discuss the question of custody at all.

B. Appellant's Petition Failed to Allege That Administrative Remedies Had Been Exhausted.

There are no presumptions in favor of the jurisdiction of Courts of the United States. (*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876), 94 U. S. 455 (1876).) One seeking the exercise of federal jurisdiction in his favor must allege in his pleading facts essential to show jurisdiction,

and if he fails to make it the necessary allegations, he has no standing in Court.

Rule 8(a)(1), Federal Rules of Civ. Proc., 28 U. S. C. A.;

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189 (1936);

Hanford v. Davis, 163 U. S. 273 (1896);

Engel v. Tribune Co., 189 F. 2d 177 (C. A. 7, 1951);

Joy v. Hague, 175 F. 2d 395 (C. A. 1, 1949), cert. den. 338 U. S. 870;

Alexander v. Westgate-Greenland Oil Co., 111 F. 2d 769, 770 (C. C. A. 9, 1940);

Royal Service Corp. v. City of Los Angeles, 98 F. 2d 551, 554 (C. C. A. 9, 1938).

The foregoing principle, well established in all cases where federal jurisdiction is claimed, applies to habeas corpus proceedings.

Dorsey v. Gill, 148 F. 2d 857, cert. den. 65 S. Ct. 1580, 325 U. S. 890, 89 L. Ed. 2003 (App. D. C., 1945).

Appellant's Petition omitted jurisdictional allegations necessary to bring him within the purview of Section 360(c) of the Immigration and Nationality Act of 1952. The Petition contains no averment that he had ever applied for a Certificate of Identity as required by Sections 360(b) and 360(c) of the state. This is an administrative remedy which must be exhausted. Even assuming, *arguendo*, that Congress did intend to change the concept of habeas corpus requiring custody and detention, then the Petition still failed for want of jurisdiction due to the fact that it failed to aver the exhaustion of administrative remedies. Clearly, under the statute, application for a certificate of identity and the appeal of a denial of

that application to the Secretary of State in the event it should be denied are jurisdictional conditions which must be alleged.

Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938);

Samanrego v. Brownell, 212 F. 2d 891 (C. C. A. 5, 1954);

Avina v. Brownell, 112 Fed. Supp. 15 (D. C., Tex., 1953).

It is submitted therefore, that by reason of appellant's failure to include in his Petition the aforementioned allegations the District Court did not require jurisdiction under the provisions of Section 360(c) of the Immigration and Nationality Act of 1952. Further, it was not necessary for a return to be filed before dismissal as the Petition itself revealed the defects described above.

Higgins v. Steele, 195 F. 2d 366 (C. A. 8, 1952);

Bowe v. Skeen, 107 Fed. Supp. 879 (D. C., W. Va. 1952).

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court, dismissing appellant's Petition for a Writ of Habeas Corpus and Denying his Order to Show Cause, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
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MAX F. DEUTZ,
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Attorneys for Appellee.

No. 14718

In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,	} <i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellee.</i>

Opening Brief of Appellant

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FILED

JUL 22 1955

PAUL P. O'BRIEN, CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 14718

Opening Brief of Appellant

STATEMENT RELATIVE TO JURISDICTION

This is an action by the United States (plaintiff below and appellee here) to enjoin the defendant (appellant) from (a) using a well on land owned by him and pumping water therefrom for irrigation of such land; (b) drilling new wells; and (c) pumping for irrigation of other lands owned by him within the boundaries of the San Carlos Federal Irrigation Project in Arizona.

The amended complaint of the plaintiff, with attached exhibits, appears at pages 3 to 92, inclusive, of the transcript of record herein, the prayer for relief being set forth upon page 19.

The appeal is from the judgment (denominated "Findings of Fact, Conclusions of Law and Decree") granting such injunction (Tr. 109-117) and the order of the court denying defendant's motion for new trial (Tr. 118). The notice of appeal appears at pages 132 and 133 of the transcript.

Plaintiff invoked the jurisdiction of the District Court under Section 1345 of Title 28 of the United States Code.

It is believed the Court of Appeals has jurisdiction under Section 1291 of Title 28, U.S.C.

STATEMENT OF THE CASE

With the permission of the court, the parties will hereafter be referred to as they appeared in the court below, i.e., appellee as plaintiff and appellant as defendant.

As will be observed from the transcript of the record, the pleadings, findings and conclusions are somewhat voluminous, but there is little or no factual dispute apparent.

As appears to defendant, the questions to be determined upon the appeal are:

1. Does the "Landowners' Agreement" ("Exhibit A", Tr. 20-50) prohibit the installation and operation of the appellant's well and pump; or does it merely provide they may be prohibited or their use restricted by regulation or order of the Secretary of the Interior?

2. Has there been any valid regulation or order of the Secretary restricting or prohibiting the use of such well and pump?

The above questions were raised in the trial court by:

- (a) The amended complaint of the plaintiff (Tr. 3-92);
- (b) Defendant's answer to amended complaint (Tr. 97-100);
- (c) Statement of counsel at the commencement of the trial (Tr. 120-128);
- (d) Objections to the reception of evidence at the trial (Tr. 128-132);
- (e) Defendant's objections to proposed findings and conclusion submitted by plaintiff (Tr. 106-108); and
- (f) Defendant's motion for new trial (Tr. 117-118).

SPECIFICATION OF ERROR

The District Court erred in rendering judgment in favor of the plaintiff and in denying defendant's motion for new trial because:

- (a) The amended complaint fails to state a claim upon which relief can be granted; and
- (b) The "Landowners' Agreement" ("Exhibit A" annexed to plaintiff's amended complaint, Tr. 20-50) contains no prohibition against the installation and operation of the defendant's well and pump, unless and until there shall have been promulgated a valid regulation or order by the Secretary of the Interior prohibiting or restricting the use of such well and pump; and there has been no such regulation or order.

SUMMARY OF ARGUMENT

1. The "Landowners' Agreement" ("Exhibit A" attached to the plaintiff's amended complaint) does not prohibit the installation or operation of the defendant's well and pump.

2. Such Landowners' Agreement does provide that such installation and operation may be prohibited or their use restricted by valid regulation or order of the Secretary of the Interior; but there has been no such valid regulation or order.

3. The remedy of the plaintiff, if there has been a violation of the decree entered by the United States District Court for the District of Arizona in cause numbered E-59-Globe, is by motion to enforce such decree and not by an independent suit for injunction.

ARGUMENT

I.

THE "LANDOWNERS' AGREEMENT" ("EXHIBIT A" ATTACHED TO THE PLAINTIFF'S AMENDED COMPLAINT) DOES NOT PROHIBIT THE INSTALLATION OR OPERATION OF THE DEFENDANT'S WELL AND PUMP.

The pertinent provision of the "Landowners' Agreement," upon which plaintiff relies for its injunction, is found upon pages 32 and 33 of the transcript of record, thus:

"All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project; and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters and agrees further not to drill or operate wells in any other way for use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project."

Plaintiff contends such provision should be read as though separated into parts and numbered as follows:

“(1) All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos Project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project;

“(2) and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters;

“(3) and agrees further not to drill or operate wells in any other way;

“(4) or use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project.”

Defendant insists such numbering and division is improper, as it is plain, as the instrument is written, there is no prohibition against the use of the irrigation facilities in question, unless the Secretary of the Interior so directs, but, if punctuation and separation into clauses are required, the sentence should be thus punctuated and divided:

“(1) All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos Project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic

water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project;

“(2) and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such water;

“(3) and further agrees not to drill or operate wells in any other way, or use or permit others to use said waters for irrigation, contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project.”

It is most respectfully submitted that if the learned government counsel who prepared the contract had intended that it bear the construction for which plaintiff now contends, he would have used the appropriate words he employed in the same document with reference to the “Indian Lands” embraced within the project. There he made it very plain that the “Indian Lands,” as distinguished from the other lands, should (unless otherwise ordered by the Secretary) “be devoted to the use and benefit of said project and the lands thereof.” In drafting that portion of the contract relating to irrigation facilities upon Indian lands, such counsel was careful to say (Tr. 33):

“Such *underground* and diffused surface waters as may be under, in, or upon *Indian lands* embraced in said project *and the wells, pumps, and facilities in connection therewith*, in so far as shall

be permitted by law and in so far as the Secretary of the Interior shall deem proper, *shall be devoted to the use and benefit of said project and the lands thereof.*" (Emphasis supplied.)

But, with reference to the non-Indian lands in the project, the language employed does not prohibit the use of wells or pumps upon privately owned property, but does subject the same to the rules, orders and regulations of the Secretary of the Interior. With emphasis supplied by the defendant, the covenant upon the part of the landowner reads:

"agrees not to drill or operate wells in any other way or use or permit others to use said waters for irrigation *contrary to any rules, orders or regulations promulgated by the Secretary of the Interior with relation to said waters on said project.*"

Stripped down to the bare essentials, then, the landowner

" . . . agrees not to drill or operate wells . . . for irrigation . . . contrary to any rules, orders or regulations promulgated by the Secretary of the Interior . . . "

To defendant it seems that the following cardinal rules for the construction of the language of contracts are here applicable:

(a) Courts in interpreting written contracts endeavor to give effect to the mutual intention of the parties as it existed when the contract was executed.

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp. (9th Cir.) 178 F. 2d 541, 552;

Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P. 2d 1022, 1026;

Henderson v. Jacobs, 73 Ariz. 195, 239 P. 2d 1082, 1085.

(b) The court cannot make a new contract for the parties.

Ernst v. Deister, 42 Ariz. 379, 26 P. 2d 648, 649;

Peterson v. Hudson Insurance Co., 41 Ariz. 31, 15 P. 2d 249, 251.

(c) Courts will give the construction most equitable to the parties and one which will not give one of the parties an unfair advantage over the other.

State for the Use of Pierson v. C. G. Willis & Sons, 46 Ariz. 217, 50 P. 2d 20, 23;

17 C. J. S., Sec. 319, pp. 739, et seq.

(d) An ambiguous contract is to be construed most strongly against the party who prepared it.

Northern Pacific R.R. Co. v. Twohy Bros. Co. (9th Cir.), 95 F. 2d 220, 223;

Aldous v. Intermountain Bldg. & Loan Assn., 36 Ariz. 225, 284 P. 353, 355;

Hoover v. Odle, 31 Ariz. 147, 250 P. 993, 994, and cases there cited.

So, we have here presented a contract prepared by the plaintiff and executed by defendant's predecessor

in the ownership of the land upon which the well is located.

We have the choice of a construction as contended by plaintiff which will deprive defendant of his use of the pump and well (concededly owned by him and located upon his own land and used for the irrigation thereof), or the construction which defendant contends appropriate, permitting him the use of the pump and well until a condition shall develop warranting an order of the Secretary of the Interior prohibiting or restricting its further use.

It is most respectfully submitted the construction placed upon the contract by defendant is reasonable and proper and does equity in the premises.

II.

SUCH LANDOWNERS' AGREEMENT DOES PROVIDE THAT SUCH INSTALLATION AND OPERATION MAY BE PROHIBITED OR THEIR USE RESTRICTED BY VALID REGULATION OR ORDER OF THE SECRETARY OF THE INTERIOR; BUT THERE HAS BEEN NO SUCH VALID REGULATION OR ORDER.

No litigation between the parties was necessary. If the use of defendant's pump and well interfered with the rights of the plaintiff, a simple order from the Secretary of the Interior would have afforded plaintiff all the relief to which it could possibly have been entitled.

The Landowners' Agreement, without distortion or punctuation supplied by either party, requires that the defendant do not drill or operate any well contrary to the rules, orders or regulations promulgated by the Secretary of the Interior.

To defendant there appear substantial reasons for such supervision by the Secretary. A well at one location in the project might prove detrimental to the other landowners, whereas at another point it might have no adverse effect and might even be beneficial to the drainage program of the district.

It is submitted that unless plaintiff can point out language in the contract which it prepared, expressly prohibiting the well and pump here in question, the court should not be asked to read into the document something that is not there.

True, plaintiff at the trial endeavored to show there was an order or regulation prohibiting defendant from using his pump and well, but plaintiff fell far short of accomplishing such objective.

The most that can be said for the documentary evidence in the record is that it contains correspondence and memoranda from one employee of the plaintiff to a fellow servant, sometimes with a copy to the defendant, and some letters written by such an employee to the defendant, together with a letter (Exhibit C annexed to the amended complaint, Tr. 81-82) written in 1938 by the then attorney for defendant to the Project Engineer at Coolidge, Arizona. Such "Exhibit C"

“Mr. Perry: It would be there anyway.

“Mr. Murless: If your Honor please, it has been pointed out in connection with the copy of the repayment contract which was rejected generally because, as I understand it, it is a duplication of the file; the copy which I offered also contains the Pinal County decree which treats that contract. It was made a condition precedent, if your Honor please, by the contract and statutes that preceded the San Carlos project.

With that further information concerning that which was offered, and particularly the certified copy of the judgment and decree in 5090 Pinal County, we offer that judgment again, if your Honor please.

“Mr. Perry: I object to it, if your Honor please, it doesn't tend to prove or disprove any issue in this case.

“The Court: Well, I don't see that it does but it may be received.” (Tr. 129-130).

If defendant has violated any provision of the equity decree referred to and plaintiff seeks enforcement of such decree, its remedy is by a motion for enforcement to be filed in that action.

In *Taylor v. Tempe Irrigating Canal Co.*, 21 Ariz. 574, 193 P. 12, 13-15, it is said:

“We have come to the conclusion, after much reflection, that plaintiffs cannot be permitted to pursue the remedy of mandamus, because the Kent decree itself has pointed out for them and others

in like situation another, better, speedier, and more adequate remedy, by formal application in the case in which that decree was entered. . . .

“It would be an anomaly in the administration of the law to permit a party claiming a right in an action over which the court retains jurisdiction, as in the *Hurley-Abbott* case, to seek the protection or enforcement of that right in a different and independent action. Why not apply for relief or protection in the pending action? What reason or excuse may be suggested to justify another and different action? If the right asserted has been fully ascertained and determined, the court, upon application, or, for that matter, upon its own motion, possesses the power to protect or enforce it and to that end it may make orders and punish for their disobedience. If the right asserted has not been finally ascertained and determined or is in doubt, the court possesses the power, in disputes and controversies, to do justice and equity between the parties. The remedy is simple and at hand.”

CONCLUSION

It is most respectfully submitted that plaintiff, by this action, attempts to have the court do that which the Secretary of the Interior has apparently failed or refused to do, i.e., prohibit the use of defendant's well and pump. If plaintiff is entitled to such an order it should experience little difficulty in obtaining it; but, apparently plaintiff's employees do not believe in the efficacy of such a simple remedy.

It is also most respectfully insisted that neither by pleading nor proof did plaintiff establish its right to an injunction, and that the judgment of the trial court should be reversed.

Respectfully submitted,

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No. 14,718

IN THE

United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

AMICUS CURIAE BRIEF OF
SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 14,718

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PAUL M. BROPHY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

AMICUS CURIAE BRIEF OF

SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT.

This Amicus Curiae Brief is presented pursuant to paragraph 9 (c) of Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit, for the San Carlos Irrigation and Drainage District, a political subdivision of the State of Arizona¹ and is sponsored by the undersigned attorney for and authorized law officer of the San Carlos Irrigation and Drainage District.

¹Article 13, §7, Constitution of Arizona. Arizona Code Annotated 1939, 1952 Cumulative Supplement, page 44.

**STATEMENT OF INTEREST OF AMICUS CURIAE
IN THE CASE.**

The Act of Congress approved June 7, 1924, commonly called the San Carlos Act, provided that no funds therein appropriated for constructing works on the San Carlos Project should be expended for construction on account of privately owned lands until a district embracing those lands had been formed under state law and such district had executed an appropriate repayment contract in accordance with the terms of the act.² Each owner of privately owned lands who offered his lands for inclusion in the San Carlos Project agreed by the execution of the Landowners' Agreement between such landowner and the Secretary of the Interior that all owners of lands taken into the project would organize themselves into a district in order to be able to act as a unit in all dealings with the Secretary of the Interior and also agreed that such district should enter into the Repayment Contract required by the Act of Congress of June 7, 1924.³ Accordingly, the San Carlos Irrigation and Drainage District was duly organized under the laws of the State of Arizona to embrace the 50,000 acres of non-Indian owned lands within the San Carlos Project and executed the Repayment Contract with the United States of America, as agent for the non-Indian landowners.⁴ The

²R. 24, Sec. 4, Act of Congress approved June 7, 1924.

³R. 40-41, Landowners' Agreement with the Secretary of the Interior.

⁴R. 112, Finding of Fact No. 6.

District was a party defendant, ranged in interest on the side of the plaintiff, in the case of the United States v. Gila Valley Irrigation District, et al., Equity 59—Globe, in which the United States District Court for the District of Arizona entered a decree, commonly referred to as the Gila River Decree, which determined and set forth, among other things, the water rights for the lands of the San Carlos Project.⁵

Appellant claims in his brief that this lawsuit was unnecessary and implies that this whole controversy is trivial. It is believed that the historical background surrounding the formation and operation of the San Carlos Project will readily disclose the importance of the issues presented by this case and will prove of value in interpreting the various instruments upon which the lower Court based its judgment. Accordingly, the Court is requested to take judicial notice of the historical background hereinafter set forth. All such matters appear either in public reports prepared by and under the direction of the executive branch of the government of the United States or are contained in legislative hearings of the Congress of the United States or are matters of public record or of common knowledge in the area involved in this litigation. It is well settled that the Courts will take judicial notice of such information and these prin-

⁵Stipulation For and Consent to Entry of Decree in *U. S. v. Gila Valley Irrigation District, et al.* (page 1 following printed copy of Gila River Decree).

ciples of judicial notice have been repeatedly applied in cases involving irrigation and water rights.⁶

HISTORICAL BACKGROUND.

The San Carlos Federal Irrigation Project was formed pursuant to Act of Congress and constructed with funds appropriated by Congress, primarily for the purpose of making water available for the irrigation of 50,000 acres of Indian lands within the Gila River Indian Reservation in Pinal County, Arizona.⁷ Early studies of the costs of constructing and operating the project made by the government for the purpose of determining the feasibility of the undertaking, showed that the per acre cost of a project of only 50,000 acres, composed entirely of Indian lands, was prohibitive.⁸ In order to hold construction, operation and maintenance costs to a practicable per acre figure it was necessary to bring non-Indian lands into the project and the project as ultimately formed consists of 100,000 acres of which 50,000

⁶*Arizona v. California*, 283 U. S. 423, 453 (1931), 51 S. Ct. 522; *Greeson v. Imperial Irr. Dist.*, 59 F. 2d 529, 531 (C. A. 9, 1932); *Nev-Cal Electric Securities Co. v. Imperial Irr. Dist.*, 85 F. 2d 886, 904-906 (C. A. 9, 1936); *United States v. Best & Co.*, 86 F. 2d 23, 25-28 (C. C. P. A., 1936); *Rank v. Krug*, 90 F. Supp. 773, 781 (D. C. S. D. Cal., 1950); *Fletcher v. Jones*, 105 F. 2d 58, 61-62 (C. A. Dist. Col., 1939).

⁷R. 22, Sec. 1, Act of Congress approved June 7, 1924.

⁸Appendix II, page xiv, Sec. 189 of Report to the Secretary of War of a Board of Engineer Officers, United States Army (House Document 791).

acres are in Indian ownership and 50,000 in non-Indian ownership.⁹

Studies made respecting the water supply available to the project showed that the quantity of surface waters which could be relied upon for project use could not be expected to meet the irrigation needs of more than 80,000 acres¹⁰ and it was evident that if the project was to be undertaken water sufficient to take care of the irrigation requirements of 20,000 acres, or one-fifth of the total water required for a 100,000 acre project, must come from well or pumped water. The possibility that the groundwaters could be used to form a part of the project water supply was recognized at an early date¹¹ and it was concluded that a 100,000 acre project was feasible, with 80,000 acres to be supplied with gravity water and 20,000 acres to be supplied by a comprehensive project system to pump water from underground sources in connection with drainage.¹²

In order to make these groundwaters which were essential to the successful operation of the project available for the irrigation of project lands, Congress

⁹R. 52-53, Repayment Contract between the United States and the San Carlos Irrigation and Drainage District.

¹⁰Appendix I, pages vi-vii, Appendix A—Report on the San Carlos Project and the History of Irrigation along the Gila River, pages 95-96, 97.

¹¹Appendix II, pages x-xiii, Secs. 118, 141, 153, 156, 158, 159 of Report to the Secretary of War of a Board of Engineer Officers, United States Army (House Document 791).

¹²Appendix III, pages xvi-xvii, Hearings before the Subcommittee of House Committee on Appropriations, Seventieth Congress, First Session, pages 277-279.

by the Act approved March 7, 1928 (45 Stat. 200),¹³ appropriated funds for the purpose of providing a pumping and drainage system for the project and by the same act authorized the expenditure of additional funds for development of an electric power plant at Coolidge Dam to provide electric power for the purpose, among others, of supplying electric energy to operate the project pumping system. From time to time thereafter, Congress appropriated or authorized the expenditure of additional funds for the purpose of constructing, enlarging and rehabilitating the project system of wells and pumping works. In 1934 a comprehensive program of construction of project irrigation wells was initiated which resulted in the drilling and equipping of 81 new project wells by the end of 1935, which when added to existing project wells made a total of 100 project wells, 8 of which were not equipped with pumps.¹⁴ Records of the Bureau of Indian Affairs show that as of June 1, 1955 there were 108 active project irrigation wells, 7 of which were replacement wells to replace previous project wells and that 21 other project wells had been capped or abandoned, or are used only for pumping domestic water.¹⁵ As of June 30, 1955 the total sum of \$1,453,610.43 had been expended for the construction and acquisition of the project system of wells

¹³Appendix IV, pages xviii-xix, Act of Congress approved March 7, 1928 (45 Stat. 200).

¹⁴Appendix V, 1. (a), pages xx-xxii (see copy and letter), San Carlos Project Annual Report—Fiscal Year 1936, pages 11-13.

¹⁵Appendix V, 2. (e), page xxviii, San Carlos Project Pumps—Well Numbers, Location, Remarks. Revised 6/1/55.

and pumps.¹⁶ During the calendar years 1934 through 1954 the project pumping system pumped and delivered to irrigation laterals a total of 2,079,649 acre-feet of water.¹⁷

The above recited facts disclose that the issues to be resolved in this case are of vital concern to all landowners of the San Carlos Project including the owners of the 50,000 acres of non-Indian owned lands who have made *Amicus Curiae* their agent in matters of project concern. It is evident that it is a matter of great importance to project landowners whether all the groundwaters beneath project lands shall be developed and utilized on an orderly and integrated basis by the project pumping system owned by and existing for the benefit of all project landowners and such waters made available to all project lands on an equal pro rata basis, or whether individual landowners have the right to make further drafts upon that groundwater supply for their individual use and benefit in addition to their pro rata share made available to them by the jointly owned project pumping system.

Nor is this question rendered of any less importance to project landowners because the particular project landowner now before the Court concedes that

¹⁶Appendix V, 2. (a)—2. (d), pages xxiv-xxvii, San Carlos Project Monthly Summary Cost Report—Month of June, 1952; San Carlos Project Operating Statement, Irrigation Construction—Fiscal Year 1953; San Carlos Project Operating Statement, Irrigation Construction—Fiscal Year 1954; San Carlos Project Operating Statement, Irrigation Construction—Fiscal Year 1955.

¹⁷Appendix V, 3. (a), page xxx, Pumped Waters of San Carlos Project.

the Secretary of the Interior may by order, rule or regulation prohibit any project landowner from making private and individual drafts against this groundwater supply. The present dispute is not a trivial matter which could have been easily and readily solved in the form of some order, rule or regulation promulgated by the Secretary of the Interior. The contention of the appellant regarding the rights of the individual project landowner and the prerogatives of the Secretary of the Interior respecting these groundwaters raises an issue of grave concern to every project landowner. That issue is: Do applicable contracts, Court decree and legislation definitely and finally and in and of themselves, guarantee to each project landowner that the groundwaters beneath all project lands are a common project asset to which each acre thereof shall at all times be entitled to the same pro rata share; or are the rights to such groundwaters and the share which any particular parcel of project lands shall be entitled to receive variable and dependent upon the uncertainties of the policies and actions of employees of the federal government?

The landowners of this project may be expected to receive small comfort from any attempted assurance that the efforts of individual landowners to receive more than their pro rata share of project groundwaters may be stopped at any time by specific order, rule or regulation of the Secretary of the Interior, when since 1938 they have observed the spectacle of this appellant tapping such water supply at will

and the Secretary of the Interior allowing such conduct to continue for some 13 years before asking the Courts to put an end to these activities of appellant.

It is the position of *Amicus Curiae* that one of the basic principles governing the formation of the San Carlos Project was that all groundwater beneath all project lands constitute a common project water supply and that as to both pumped and stored water each acre of project land is entitled to its equal pro rata share, that such principle was recognized and guaranteed to all project landowners by the provisions of the Landowners' Agreement, the Repayment Contract and the Gila River Decree; that no authority is vested in the Secretary of the Interior to suspend the application of this basic principle pending the making of rules, orders or regulations by that official, and that neither the Secretary of the Interior nor anyone else possesses the power to waive, relinquish or impair the project landowners' equal pro rata rights in and to these waters.

STATEMENT OF THE CASE.

Appellee's brief correctly sets forth the events which brought about the present litigation.

Aside from the question raised by appellee of whether or not appellant has perfected a proper appeal in this case, it appears to *Amicus Curiae* that this litigation involves the following questions:

(1) Do applicable contracts, legislation and Court decree relating to the San Carlos Project in and of

themselves prohibit a landowner of that project from drilling and operating his own individual irrigation well on the lands of such project, or may the project landowner perform such acts except when prohibited from doing so by express order, rule or regulation of the Secretary of the Interior?

(2) If the drilling and operation of such a well is proper in the absence of prohibition by Secretarial order, rule or regulation, has the Secretary of the Interior made such an order, rule or regulation with reference to appellant's well?

(3) Did the lower Court have jurisdiction to entertain this action?

ARGUMENT.

IS APPELLANT'S APPEAL FATALLY DEFECTIVE?

Amicus Curiae is in full accord with the position of the United States in this case that the answer to the question of the extent of the rights of project landowners in the groundwater beneath project lands is to be found in the provisions of the Landowners' Agreement, the Repayment Contract, the Gila River Decree and certain acts of Congress and that appellant's brief improperly attempts to restrict this question to an interpretation of certain language contained in the Landowners' Agreement. However, it is doubted that this attempt by appellant means that he has failed to appeal from the judgment and decree entered by the lower Court. While there is no justification for the assumption made in appellant's brief

that the judgment of the lower Court was predicated solely on that Court's interpretation of the Landowners' Agreement, it appears to *Amicus Curiae* that the record on appeal in this case informs this Court of the issues determined by the lower Court and the respects in which it is claimed by appellant that the lower Court was in error. The fact that appellant may imperfectly state the grounds upon which the lower Court based its judgment should not, we believe, preclude this Court from passing on the correctness of that judgment. This is particularly true in a case such as this where issues important to both the United States and all San Carlos Project landowners are involved. The uncertainty respecting rights of San Carlos Project landowners to the groundwaters beneath project lands has plagued both the United States and the project landowners since appellant drilled and began pumping his private well on project lands in 1938. It was hoped when the United States finally presented that dispute to the Courts in 1951 that such litigation would result in a final judgment settling that question once and for all. It would be an anomalous situation if this case, which has been looked upon as a test case to secure an adjudication which would settle this question, should go off on a technical question of appellate procedure. While such a decision would serve to stop the appellant from making private and individual use of the project groundwater supply, it would serve as no precedent with regard to those project landowners who have followed appellant's example of making private drafts against

the groundwater beneath project lands, nor to others who may contemplate doing so in the future.

DO APPLICABLE CONTRACTS, LEGISLATION AND COURT DECREE RELATING TO THE SAN CARLOS PROJECT IN AND OF THEMSELVES PROHIBIT A LANDOWNER OF THAT PROJECT FROM DRILLING AND OPERATING HIS OWN INDIVIDUAL IRRIGATION WELL ON THE LANDS OF SUCH PROJECT, OR MAY THE PROJECT LANDOWNER PERFORM SUCH ACTS UNLESS AND UNTIL PROHIBITED FROM DOING SO BY EXPRESS ORDER, RULE OR REGULATION OF THE SECRETARY OF THE INTERIOR?

Pages 5 through 10 of opening brief of appellant set forth appellant's argument in support of his contention that his acts in drilling and operating the well in question were within his rights. It will be observed that throughout such argument it is assumed by appellant that unless the provisions of the Landowners' Agreement quoted on page 5 of his brief denies to the project landowner the right to drill and operate a private irrigation well on project lands he is perfectly free to make such a draft on these groundwaters, except at such times as the Secretary of the Interior might see fit to prohibit such conduct by express order, rule or regulation.

As will be hereinafter pointed out, there is other language in the Landowners' Agreement, as well as in the Repayment Contract and the Gila River Decree, which precludes the individual project landowner from drilling or operating a private irrigation well on his project lands. However, it is believed that the language found in the Landowners' Agreement quoted

on page 5 of appellant's brief and relied upon as justifying his present conduct does not mean what appellant claims it means.

The core of the dispute regarding the meaning to be attributed to this sentence contained in the Landowners' Agreement has to do with the words "and further agrees not to drill or operate wells in any other way". Appellant argues that these words relate only to the language immediately following and mean only that the landowner agrees not to drill or operate an irrigation well on project lands contrary to any order, rule or regulation promulgated by the Secretary.

It must be apparent to anyone who carefully reads this sentence that it is far from a model of clarity and that its correct interpretation requires careful analysis. It may be that the language relied upon by appellant if read out of context and given only a cursory consideration might possibly be thought to have the meaning attributed to it by appellant. However, when this entire sentence is carefully scrutinized it is evident that appellant's interpretation must be rejected.

The first part of this sentence which reads as follows:

"All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos Project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for

development and use as an irrigation water supply for said project;”

provides in substance that all groundwaters in or upon the white lands in the project shall at all times be available to the project for development and use as a project irrigation water supply, except so much thereof as shall be needed and used by the landowners for their domestic water supply. The term “project” therein used obviously refers to the rights of project landowners as a whole. Separate and individual rights are reserved to the individual landowners in only such amounts as they may require for their domestic needs and all remaining groundwaters are pledged to the project lands as a whole. It will be observed that this part of the sentence requires that *all of such groundwater* shall be available as and for a project water supply *at all times*. This language does not say, nor in any way imply, that only so much of these groundwaters shall be available as a project water supply as might be left after drafts are made thereon by the private irrigation pumps of individual landowners. Neither does it say that all of these groundwaters shall be available as a project water supply only at those times when the Secretary of the Interior might make them available by ordering individual landowners not to diminish the quantity thereof. The intent of this language is plain. It was intended and was doubtless so understood by all concerned, to provide that all groundwaters beneath all white owned project lands should constitute a common project water supply to be developed and made available only by the land-

owners as a unit acting through their jointly owned project pumping system and to be shared by each acre of project land on an equal pro rata basis.

The balance of this sentence was designed and added to carry out the intent and objective expressed in the first part thereof.

The next part of this sentence which reads:

“and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters”

merely contains the agreement of the landowner to give, with reference to his lands, the rights of way necessary to enable such groundwaters to be developed and utilized as a common project water supply.

The balance of the sentence which reads as follows:

“and agrees further not to drill or operate wells in any other way or use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project.”

is the part of this sentence which is in dispute. Appellant contends that it expresses but one thought and that the agreement therein made by the landowner not to drill or operate a well on project lands is tied in with and relates expressly to the language immediately following, and means that the project landowner agreed not to drill or operate an irrigation

well only at such times as the Secretary might by order, rule or regulation prohibit him from doing so.

It is the position of the United States and of *Amicus Curiae* that the agreement not to drill or operate a well is not so limited but was intended to be an agreement by all project landowners to refrain from drilling or operating a well on project lands, except a well for the landowner's domestic water supply. It will be observed that by this language the project landowner agrees not to drill or operate a well in any "other way". Since the only "way" provided for in the language preceding this part of the sentence in which an individual may pump such groundwater is that of pumping it for his domestic water supply, it seems clear that the "other way" referred to in this part of the sentence is for domestic use and that by this part of the sentence it was intended that each landowner should and did agree not to drill or operate any wells on his project lands except those necessary to meet his domestic water supply requirements.

It will be observed that the remainder of the sentence following the agreement not to drill or operate wells says nothing about drilling or operating wells on project lands. The normal and unstrained interpretation of this part of the sentence is that it has nothing to do with the drilling or operation of private wells by individual landowners but relates only to the use of the groundwaters which are developed and made available by the jointly owned project pumping system as and for a project water supply. This

language was used for the purpose of insuring that with regard to that common project asset each landowner would use and permit others to use the same only in conformity with rules, orders and regulations of the Secretary respecting it. For example, it was intended, no doubt, to mean that each landowner would not use a greater amount of project groundwaters per year than that set by the annual apportionment of stored and pumped waters required by the terms of the Repayment Contract to be made by order of the Secretary at the beginning of each irrigation season.¹⁸ It may likewise have been intended to cover such things as observing with respect to project groundwaters any water conservation measures established by order, rule or regulation of the Secretary, such as the excess water system established by order of the Secretary whereby all landowners are required to pay an extra charge on each acre foot of water used by them in excess of two acre feet of water per cultivated acre per irrigation season.¹⁹ There is no point in enumerating the numerous other examples which might be suggested of possible rules, orders or regulations had in mind when it was agreed by this language that the landowner would not use or permit others to use the groundwaters of the project contrary to any order, rule or regulation of the Secretary respecting such groundwaters. The point is that this part of the sentence deals with the use of

¹⁸R. 54, Repayment Contract between the United States and the San Carlos Irrigation and Drainage District.

¹⁹Appendix VI, page xxxii, Sec. 130.69e(b), Title 25—Indians, 1949 Edition, Code of Federal Regulations, page 153.

those groundwaters which are a common project water supply and has nothing to do with the subject of drilling or operating private wells for the irrigation of project lands by the individual landowners, which latter subject is expressly dealt with and fully covered by the part of the sentence immediately preceding by which the landowner agrees not to drill or operate a well in any way other than to develop and pump his domestic water requirements. That part of the sentence dealing with Secretarial order, rule or regulation was intended as a further safeguard of the common project groundwater supply and not as language which would have the effect of nullifying the preceding provisions of the sentence by giving individual landowners free rein to tap that common supply for their own individual benefit, unless and until explicitly ordered not to do so by the Secretary of the Interior.

One important rule of construction resorted to by the Courts in arriving at the intent of language used by contracting parties is that each word, clause, phrase and part thereof must be given effect if reasonably possible, and that a construction which results in conflicts between different parts of the agreement will not be followed if it is reasonably possible to reconcile such terms.²⁰ The interpretation here con-

²⁰*F. W. Woolworth Co. v. Petersen*, 78 F. 2d 47 (C. A. 10, 1935); *Peters v. Thor*, 12 P. 2d 781 (Ariz., 1932); *Treadway v. Western Cotton Oil & Ginning Co.*, 10 P. 2d 371, 375 (Ariz., 1932); *Miller Cattle Co. v. Mattice*, 298 P. 640, 642-643 (Ariz., 1931); *Linde Dredging Co. v. Southwest L. E. Myers Co.*, 67 F.2d 969, 972 (C. A. 5, 1933).

tended for results in a consistent harmonious sentence with full effect given to each clause and part thereof. Appellant's interpretation that the project landowner has a right to make private and individual drafts against the groundwaters beneath non-Indian owned project lands, except at such times as the Secretary of the Interior might see fit to prohibit such conduct, cannot be reconciled with the first part of the sentence which guarantees to all project landowners that all such groundwaters shall at all times be available to the project landowners as a unit and to be used as a common project irrigation supply. It seems beyond all dispute that all such groundwaters cannot at all times be available for use as a project irrigation supply if sometimes some landowners are withdrawing and using some of these waters by means of their individual private irrigation wells.

It is contended that appellant's position is supported by the fact that the same language was not used in the Landowners' Agreement in dealing with the groundwaters beneath white owned lands as was used in that agreement when referring to the groundwaters beneath the Indian lands. Apparently appellant's theory is that such provisions respecting the groundwaters beneath Indian lands clearly prohibit the Indian landowner from drilling or operating a private irrigation well on his project lands and if those who drafted the Landowners' Agreement had intended the same result with reference to white owned lands they would have employed the same language. Numerous reasons suggest themselves why

the Landowners' Agreement did not deal with the groundwater beneath these two kinds of lands in the project under one provision or through use of identical words. The Landowners' Agreement was an agreement entered into and signed by each non-Indian landowner who offered his lands for inclusion in the project, and such agreement contains numerous covenants and promises of such white landowners. On the other hand, the Indian landowners were not parties to this agreement and the agreement does not, of course, set forth covenants and promises on the part of the individual Indian landowners. Under these circumstances it is perfectly natural that different language was used and such fact gives rise to no presumption that these two classes of landowners were to have different rights respecting the groundwaters beneath project lands.

There is, however, another provision in the Landowners' Agreement which does deal with the rights of both the Indian and white landowners in the pumped waters of the project. This provision reads:

*"All Indian and white lands which shall be in said San Carlos project and under said Coolidge Reservoir shall be entitled to share equally in all of the stored and pumped water of said project insofar as that shall be physically feasible, * * *"* (Emphasis supplied.)²¹

Here is conclusive evidence, if any be needed, that the rights respecting groundwaters beneath the lands

²¹R. 38, Landowners' Agreement with the Secretary of the Interior.

of the San Carlos Project are the same for both Indian and white lands. Moreover, this language explicitly provides that all lands within the project shall share equally in all of the pumped water of the project. It plainly means that each and every acre of land within the project shall be entitled to the same share of all groundwaters beneath all project land. The only exception or condition attached is that of physical feasibility. It says nothing about Secretarial order, rule or regulation as a condition precedent to such equal sharing. Nor does it in any way recognize or intimate any right of any landowner to draw from such common underground water supply more than his land's equal per acre share unless, or until, stopped by order, rule or regulation of that official. This provision found in the Landowner's Agreement is in perfect harmony with the interpretation which we have heretofore placed on the sentence in the Landowners' Agreement discussed above. The interpretation contended for by appellant cannot be reconciled with this language guaranteeing to each acre of project lands the same equal share in all project groundwaters.

Appellant suggests that it is appropriate that the Secretary be vested with the discretion of deciding which project landowners may drill and operate private irrigation wells on their project land because there might exist a need for drainage pumping which would make it possible for certain landowners to drill and operate private irrigation wells with no adverse effect on the rights of other project landowners.

Should the critical water shortage which has faced the project almost from its inception ever abate and a situation such as that hypothesized by appellant requiring pumping for drainage ever come about, it seems obvious that it would be necessary to follow the plan under which the project was formed whereby such drainage waters are to be handled by the project pumping system and utilized as a part of the project irrigation water supply.²² In view of such plan there would have been no occasion to vest in the Secretary of the Interior the discretion of relegating the function of drainage pumping to individual landowners. Nor can it properly be said that it would be beneficial to project landowners as a whole for some individual landowners to operate drainage wells on their project lands. Such drainage pumpage when handled by the project pumping system would, like all other groundwaters pumped by project pumps, form a part of the project irrigation water supply for the mutual benefit of all project lands and it would not be possible for an individual landowner, under the guise of pumping for drainage purposes, to extract and use the project groundwaters without such water augmenting the common supply, nor could he by means of a private well withdraw and use such water without it being charged against his proportionate share of the common supply.

If the provisions of the Landowners' Agreement could be said to leave any reasonable doubt whether

²²Appendix III, pages xvi-xvii, Hearings before the Subcommittee of House Committee on Appropriations, Seventieth Congress, First Session, pages 277-279.

individual landowners may make withdrawals from the groundwater supply beneath their lands for their individual use and benefit by means of private wells and pumps, it is believed that the Repayment Contract entered into between the United States of America, acting through the Secretary of the Interior, and the San Carlos Irrigation and Drainage District contains language which should forever dispel any such doubt. By the execution of the Landowners' Agreement each non-Indian landowner offering his land for inclusion within the project made this District his agent in dealing with the Secretary and in executing the Repayment Contract. Accordingly, the provisions of that contract so entered into by the District are as much the agreement of each landowner and as binding upon him as if he had individually executed it. Paragraph 7 of the Repayment Contract provides in part as follows:

*“7. The stored and pumped water of the San Carlos Project shall be deemed a common Project water supply in which all lands in the project and under the San Carlos Reservoir shall be entitled to share equally, and all such waters shall be distributed to the lands of the project as equitably as the physical conditions permit. Apportionment of such water shall be made by the Secretary of the Interior at the beginning of each annual irrigation season and any increase of the water supply during a particular season may be apportioned likewise. * * **

“All water and water rights of the San Carlos Project and opportunities connected

therewith shall be used for the advantage of that project." (Emphasis supplied.)²³

The above quoted language contained in the Repayment Contract makes the groundwaters of the project a common project water supply. This can only mean that they shall be used for the equal pro rata benefit of all project lands. That this is so is made abundantly clear by the succeeding provisions of the above quoted language to the effect that all project lands shall be entitled to share equally in these waters and the further direction that such waters shall be distributed to project lands as equitably as physical conditions will allow, with the final direction that all project water and water rights and all opportunities connected therewith shall be used for the benefit of that project.

The foregoing language could have been intended for only one purpose, namely: that of defining and fixing the status of the stored water impounded behind the Coolidge Dam and the groundwaters underlying project lands to be that of the common asset of all project lands and of spelling out that each acre of land within the project shall be entitled to the same equal share therein and that the distribution of this water shall be in such manner as to recognize and carry out those rights. This being so, it follows that no project landowner or any group or combination thereof shall receive more than his or their equal share in that common project supply, nor shall he or they deprive any

²³R. 54-55, paragraph 7, Repayment Contract between the United States and the San Carlos Irrigation and Drainage District.

other landowner of his equal rights therein, whether by tapping that common supply by means of private irrigation wells or by other means or devices and no Secretarial order, rule or regulation is needed, required or appropriate to make this so.

And finally the Gila River Decree in defining and adjudicating all project water rights recognized these groundwaters as a project water supply and provided on page 105:

“That all Indian lands and all white lands now or hereinafter designated by the Secretary of the Interior as within the San Carlos Project and under said San Carlos Reservoir shall be entitled to share equally in all of the stored and pumped water of said Project insofar as that shall be physically feasible, and said lands shall share equally in all of the water of said Project of every nature as long as the stored and unstored water supply for said Project shall be sufficient for Project needs, and as far as that shall be physically feasible; * * *”

It will be observed that the provisions of the Landowners' Agreement, the Repayment Contract and the Gila River Decree serve to show a consistent intent steadily followed to make all groundwaters beneath all project lands a common project water supply to be developed only by the project through the joint efforts of project landowners by means of the project pumping system for the equal benefit of each acre of project land. This central theme runs through and is carried out by each of these instruments and it is

impossible to reconcile any such argument as that advanced by appellant with this fundamental concept of the rights to the use of the groundwaters beneath project lands.

Nowhere is there anything in any of these instruments which in any way indicates that the basic concept of equal sharing in project groundwaters is to become effective only when and if the Secretary of the Interior might see fit to give it life by implementing orders, rules or regulations.

It should be kept in mind that the landowners, as well as the government, had definite objectives when they offered their lands for inclusion in the project. There were already irrigation wells and pumps on some of the lands offered for inclusion in the project and the owners of such lands agreed to convey such wells and pumps to the project.²⁴ It seems a certainty that no landowner would for one moment have considered signing an agreement whereby he bound himself to turn over to the project existing wells and pumps owned by him so that they might become a part of the jointly owned pumping system, if the Secretary of the Interior was to be vested with the discretion of permitting other landowners on the project to drill and operate private wells upon their project lands for their individual use and benefit and in competition with the jointly owned project pumping system. The project landowners no doubt intended that the agreement which they signed by which they

²⁴R. 33, Landowners' Agreement with the Secretary of the Interior.

offered their lands for inclusion in the project should insofar as possible safeguard them in their plans to obtain a reliable water supply and that this would be so, not only as to attempted encroachments by their neighbors, but also as to arbitrary or ill-advised action by government employees. It is not to be supposed that such landowners were unaware that the policies of government bureaus are, on occasion, determined by small men in high places who split hairs over rules and regulations. Doubtless, the landowners in their daily living observed the uncertainties of bureaucratic policies and how those policies sometimes waver when subjected to the pressures of political expediency and are altered with changes of administration or departmental personnel. The prospect of obtaining a reliable water supply for their lands must have been in those times, as it is now, too precious for these landowners to be willing that their rights in these important waters should rest upon the uncertainties of the acts of men rather than be guaranteed to them by the binding provisions of written instruments.

There is one other matter which is of assistance in passing upon this question. That is the Act of Congress of March 7, 1947 (61 Stat. 8)²⁵ and the legislative history of that act. It will be seen by a reading of such act that in 1947 the San Carlos Project faced an emergency due to a deficient water supply resulting from a severe and extended drouth. This emer-

²⁵Appendix VII, pages xxxiii-xxxvi, Act of Congress approved March 7, 1947 (61 Stat. 8).

gency necessitated the enlargement of the project well and pumping system and rehabilitation and repair of the existing project pumping works. It was thought that the accomplishment of this work would be expedited if the District acted as agent of the Secretary of the Interior in enlarging and repairing the project well and pumping system. However, even under these circumstances, doubt existed that the Secretary could authorize any but employees of his department to drill wells on project lands although such wells were to be an addition to the project pumping system and for the development of water exclusively for use as a part of the common project water supply. Accordingly, it was deemed advisable to secure authorization of the Congress for the Secretary to enter into a contract with the District whereby the District was to act as agent for the Secretary in performing this work. It will be observed that the Congress took pains to provide in such legislation that the groundwaters so developed by the District were to be "exclusively for use as a part of the common stored and pumped water supply of said project" for the purpose of "making underground waters available exclusively for use on all lands of the project".

The legislative history of this act is highly significant. The Senate Committee on Public Lands in reporting on this proposed act reported:

"The San Carlos irrigation project, Arizona, comprises 100,000 acres of land, 50,000 acres of which are Indian lands, and the remaining 50,000 acres in white ownership. The project

was built by the Indian Service; and under contracts entered into between the Interior Department and the white landowners, *these deeded their right to the use of the underground water to the Department of the Interior to be developed as a part of the common water supply for the project.*" (Emphasis supplied.)²⁶

Similarly, the House Committee on Public Lands stated in its report:

"To prevent dissipation of the underground waters, these farmers were required by the Government *to surrender their ordinary privileges of land ownership in tapping the underground water supply.*" (Emphasis supplied.)²⁷

Such legislative history clearly shows that the branch of the federal government which authorized and provided the funds for the construction of the San Carlos Project considered that when the non-Indian landowners offered their lands for inclusion in the project pursuant to authorization by the Congress, such landowners surrendered their individual rights to withdraw the groundwaters beneath their project lands and agreed that these groundwaters should be developed as a part of the common water supply for the benefit of the whole project.

The rules for construction of contracts and the Court decisions cited in support thereof appearing on

²⁶Senate Report No. 23, Eightieth Congress, First Session.

²⁷House Report No. 51, Eightieth Congress, First Session.

pages 8 and 9 of appellant's opening brief announce sound principles of law but lend no support to appellant's position in this case. Appellant is, of course, correct in stating that the Courts in interpreting written contracts will endeavor to give effect to the mutual intention of the parties as it existed when the contract was executed. It is submitted, however, that the mutual intention of all parties concerned in the formation of the San Carlos Project can be given effect only if the various applicable instruments affecting the project be interpreted as evidencing the intent that all project landowners pooled the groundwaters beneath their project lands into a common water supply to be developed and made available by the jointly owned project pumping system and that it was not intended that the Secretary of the Interior be vested with any discretion to enlarge upon the equal pro rata rights of any project landowner in that common water supply.

Amicus Curiae fully endorses the principle contended for by appellant that the Courts will give the construction most equitable to the parties, and one which will not give one of the parties an unfair advantage over the other. This principle gives no comfort to appellant's position. When the members of a group enter into a joint enterprise and part with their individual control over the assets which they pool with others in the common undertaking it would be an extreme example of unfair advantage for some of those who have joined in that undertaking to receive a full share of the fruits of the joint efforts and

at the same time secure individual and private benefits at the expense of the common good. We know of nothing which would work greater inequities to project landowners than a disorganized scramble by individual landowners to place themselves in favored positions through their separate efforts to obtain the largest possible amount of the groundwaters beneath project lands. Inevitably those landowners with the largest acreage, or the greatest financial resources, or the most favorable geographical location, would be privileged over other landowners who could not join in such race due to a poor water table beneath their lands, or because their acreages or bank accounts are not large enough to justify the expense of installing private irrigation wells and pumping equipment. Such a situation would bring about an unequal and inequitable use of a limited resource owned in common by all project landowners, and the resulting loss of control by the project of this important water supply would seriously jeopardize the investments of the landowners and the government in the project.

IF THE DRILLING AND OPERATION OF SUCH A WELL IS PROPER IN THE ABSENCE OF PROHIBITION BY SECRETARIAL ORDER, RULE OR REGULATION, HAS THE SECRETARY OF THE INTERIOR MADE SUCH AN ORDER, RULE OR REGULATION WITH REFERENCE TO APPELLANT'S WELL?

Amicus Curiae has nothing to contribute which would be of assistance to the Court on this phase of the case.

DID THE LOWER COURT HAVE JURISDICTION
TO ENTERTAIN THIS ACTION?

Appellant contends that appellee should have instituted ancillary proceedings in the case of the United States v. Gila Valley Irrigation District, Equity 59—Globe, for the enforcement of the decree rendered in that case instead of the present action and cites in support of his contention the case of *Taylor v. Tempe Irrigating Canal Company*, 193 P. 12 (Ariz., 1920).

The principles announced in that case are not applicable to the present case. The decision in that case was expressly based on the particular facts before the Court and the specific wording of the so-called Kent Decree. The case involved the duty of water set by the Kent Decree, the plaintiff having sought to enforce the delivery to him of a precise quantity or rate of flow of water to which he claimed to be entitled under the provisions of the Kent Decree. The decision in the *Taylor* case pointed out that the duty of water set by the Kent Decree was only experimental and tentative and that the Court which rendered it expressly and by the terms of the decree itself retained jurisdiction to “interpret, modify, enlarge, or annul ‘any order, direction, or action of the commissioner in carrying out all the provisions of the decree,’ and also upon ‘good cause shown from time to time to modify, enlarge, or abrogate any portion or feature of the decree or of this decision and tables filed herewith as a part hereof by order or supplemental judgment or decree to be entered at the foot hereof’ ”. It was held that the plaintiff, being a party

to that decree and bound by its provisions, was, if he sought redress as to matters over which the Court in the Kent Decree retained jurisdiction, required to seek that redress in the Court which retained and had jurisdiction thereof.

The present case is not comparable to the *Taylor* case. No language such as that in the Kent Decree quoted and relied upon in that case is to be found in the provisions of the Gila River Decree. To the contrary, the Gila River Decree is complete and final in form and intent as to the water rights therein determined and the Court rendering such Decree retained no jurisdiction to modify or change any rights so adjudicated.

That the decision in the *Taylor* case was predicated upon the peculiar circumstances before the Court in that case is indicated by the fact that in other cases involving the enforcement of decreed water rights the Supreme Court of Arizona has not restricted litigants to ancillary proceedings in the action in which such water right decree was rendered. In fact, water rights established by the Gila River Decree itself have been before the Arizona Courts and the Court assumed and exercised jurisdiction to enforce water rights adjudicated by that Decree.²⁸

In the absence of peculiar facts and circumstances such as those controlling in the *Taylor* case, the rule is that one who is a party to a water right decree may

²⁸*Olsen v. Union Canal & Irrigation Co.*, 119 P. 2d 569 (Ariz., 1941).

enforce its provisions against others who are parties thereto by an independent action for an injunction restraining acts in violation of the provisions of the decree.²⁹ This precise relief was sought and obtained from the United States Supreme Court in the case of *State of Wyoming v. State of Colorado*, 298 U. S. 573, 56 S. Ct. 912, 80 L. ed. 1339.

As has been demonstrated, the acts of the appellant complained of and sought to be restrained in the instant case are in violation of the contract known as the Landowners' Agreement signed by appellant's predecessor in interest and the Repayment Contract entered into on behalf of all non-Indian landowners by the District. The complaint filed in the Federal District Court in this case is predicated upon appellant's violation of the contractual provisions of those agreements as well as his violation of the terms of the Gila River Decree. Injunction is the appropriate remedy to restrain the unlawful taking of water in violation of contractual obligations.³⁰ It is apparent that the same acts may be in violation of the terms of a contract and also in violation of the provisions of a judgment. When that is the case, we know of no principle of law and appellant has cited none, which confines a litigant to the relief of ancillary proceed-

²⁹*Biggs v. Miller*, 147 S. W. 632 (Tex., 1912); *Ward County Water Imp. Dist. v. Ward County Irr. Dist.*, 237 S. W. 584 (Tex., 1921). See also: *Sain v. Montana Power Co.*, 84 F. 2d 126 (C. A. 9, 1936).

³⁰*West Side Irrigation Co. v. United States*, 246 F. 212 (C. A. 9, 1917); *Miller & Lux v. San Joaquin Light & Power Corporation*, 65 P. 2d 1289 (Cal., 1937); *Ament v. Bickford*, 247 P. 952 (Wash., 1926).

ings for the enforcement of the judgment and precludes him from proceeding with an action founded on the contract, either for damages, for an injunction restraining violation of the agreement, or for other appropriate relief.

It is respectfully submitted that the decision of the lower Court should be affirmed.

Dated, Coolidge, Arizona,
November 1, 1955.

Respectfully submitted,
CHAS. H. REED,
Attorney for Amicus Curiae.

(Appendices I, II, III, IV, V, VI and VII.)

Appendices.



Appendix I

EXCERPTS AND VERBATIM QUOTATIONS.

From: Printed Hearings before the Committee on Indian Affairs, House of Representatives, 66th Congress, First Session, (Vol. 2 of Two Volumes and generally known as "Appendixes A, B, and C". Printed by Government Printing Office at Washington 1919.) Pages 3 to 291, inclusive.

"Appendix A—Report on the San Carlos Irrigation Project and the History of Irrigation along the Gila River".

This Appendix is cited in the first paragraph of the Act of June 7, 1924 (43 Stat. 475). For convenient reference the excerpts and full quotations therefrom will be shown by page numbers of said printed report. They are:

1. Pages 5 and 6:

"Department of the Interior
United States Indian Service (Irrigation).
Los Angeles, Calif., November 1, 1915.

Commissioner of Indian Affairs,
Washington, D. C.

(Through Mr. W. M. Reed, chief engineer.)

Sir: The following report on the status of the available water supply, and the estimated cost of the proposed San Carlos irrigation project on the Gila River, Ariz., is respectfully submitted.

“This investigation was undertaken in accordance with an authority from the Secretary of the Interior, No. 120603, dated November 8, 1913, and was continued in compliance with an item in the Indian appropriation act approved August 1, 1914, providing for investigations in connection with the San Carlos irrigation project. The initial authority provided as follows:

For all purposes necessary for proper conduct of surveys, observations, and examinations to determine the extent of water rights in and to the normal and flood flow of the Gila River, Ariz., in connection with the old Indian ditches on the Gila River reservation and others, remaining available for appropriation and use under the legal theory of prior appropriations and use and for preparation of maps, plans, drawings, specifications, and such other records as may be necessary to determine said water rights and the feasibility of any new irrigation project for Indian lands.

“The item of the Indian appropriation act, above referred to, provided for an investigation recommended by the Board of Engineer officers of the United States Army. That part of the act relating to this matter reads as follows:

For investigations recommendsd by the Board of Engineer officers of the United States Army as set forth in paragraph two hundred and seventeen of their report to the Secretary of War on February fourteenth, nineteen hundred and fourteen, House Docu-

ment number seven hundred and ninety-one, sixty-third Congress, second session, and report as to the supply of the legally available water, acreage available for irrigation, and titles thereto, the maximum and minimum estimated cost of the San Carlos irrigation project, including dam and necessary canals, ditches and laterals, with recommendation and reasons therefor, and the probable cost of adjudication of water rights along the Gila River necessary thereto, and to take the steps necessary to prevent the vesting of any water rights in addition to those, if any, now existing until further action by Congress, \$50,000.

“In compliance with this act the investigations were continued under authority No. 80303, dated September 8, 1914, issued by the Secretary of the Interior, which provided:

For all purposes necessary for continuing the conduct of surveys, observations, examinations, and investigations to determine the extent of water rights in and to the normal and flood flow of the Gila River, in Arizona, in connection with the old Indian ditches on the Gila River reservation, and others remaining available for appropriation and use under the legal theory of prior appropriation and use, and for the preparation of maps, drawings, specifications, and such other records as may be necessary to determine said water rights, and the feasibility of the San Carlos project.

SCOPE OF INVESTIGATION.

“This investigation, as directed in the above act, was undertaken primarily for the purpose of securing data relative to the existing water rights along the Gila River to assist in the determination of the quantity of water legally available for the proposed San Carlos irrigation project. The report also includes an estimate of the maximum and minimum cost of the project, as called for in the act”.

2. Page 31: “The permissible annual draft of a practicable reservoir at San Carlos, based on our present knowledge, should therefore lie between 300,000 acre-feet as an upper and 250,000 acre-feet as a lower limit. A greater draft would not be permissible, while a smaller draft would fail to utilize the possibilities of the project. Insofar as the annual draft is concerned, these two figures form the basis of the maximum and minimum cost of the project”.

3. Page 78:

“Duty of Water.

It seems to be the consensus of opinion that between 3 and 4 acre-feet of water per annum is required for successful irrigation under the conditions obtaining along the lower Gila.”

4. Pages 93 and 94: “The hydrographic investigation indicates that while the flow of the Gila varies widely from year to year, it seems to follow cycles of nine-year periods. A reservoir, to be of the greatest economic use should supply hold-over storage capacity based upon the run-off for a complete cycle.

The annual discharge of the Gila at the San Carlos dam-site based on nine-year cycles is estimated to be 350,000 acre-feet for the mean, 412,000 acre-feet for the maximum, and 281,300 acre-feet for the minimum. The maximum annual discharge of which there is record amounts to 1,011,082 acre-feet; the minimum to 99,960 acre-feet. The estimated maximum flood at San Carlos amounted to approximately 100,000 second-feet and extended over a period of six days.

“The reservoir drafts are based on a net evaporation of 60 inches per annum. A reservoir 190 feet in depth at the dam-site will have a storage capacity of 854,800 acre-feet. This reservoir will supply an annual draft of 300,000 acre-feet during the mean nine-year cycle, but during the least low-water period, with the assistance of the San Pedro, the flow of which is assumed to be 10 per cent of the Gila, it would have been dry for a period of 15 months. Without the assistance of the San Pedro it would have been dry for a period of 31 months. This is the most severe low-water period of which there is record, and it seems probably that it will not reoccur for 30 or 40 years. During the remaining period of the 21 years over which the records extend, this draft could have been maintained.

“The reservoir, with the assistance of the San Pedro, would have supplied an annual draft of 250,000 acre-feet during the entire period.”

5. Page 95: “The minimum amount of water required to produce a succession of crops during the

year has been accepted as 3 acre-feet per annum applied to the land. The greatest amount that should be used without incurring waste is accepted as 4 acre-feet.

“An annual draft of 300,000 acre-feet with a duty of water of 3 acre-feet will admit of the irrigation of 80,000 acres of land, allowing for transmission losses in the San Carlos Canyon and 20 per cent seepage losses in the canals. The above figures form the basis for the minimum reclamation charge per acre.” (Emphasis supplied.)

“An annual draft of 250,000 acre-feet with a duty of water of 4 acre-feet, would irrigate 50,000 acres of land. These figures form a basis for the maximum reclamation charge per acre.”

6. Pages 95 and 96: “The storage project, planned on a basis of an annual draft of 300,000 acre-feet *to irrigate 80,000 acres of land* with a duty of water of 3 acre-feet, will cost a total of \$5,497,533, exclusive of water rights, and including these, \$6,593,503. The construction charge on this basis will amount to \$68.72 per acre. Including the purchase of water rights, the reclamation charge will be \$82.42 per acre. These are the minimum construction and reclamation charges.” (Emphasis supplied.)

“The project, based on an annual draft of 250,000 acre-feet to irrigate 50,000 acres of land with a duty of water of 4 acre-feet, will cost \$5,087,577, exclusive of water rights; including these \$6,183,527. The construction charge on this basis amounts to \$101.75 per

acre, the total charge, including the purchase of water rights, to \$123.67. These figures are the maximum construction and reclamation charge per acre."

7. Pages 96, 97, 99:

"Conclusions.

"The proposed San Carlos project is entirely practicable from a construction standpoint, and is eminently desirable in that it will develop agriculturally a large section of Arizona which is now unproductive, but it has some serious faults, of a physical and economic nature, that should receive careful consideration before any plan of reclamation is adopted.

"* * *

"The most attractive plan so far considered for the San Carlos project is that presenting the minimum reclamation charge per acre. This is based on an annual draft from the reservoir of 300,000 acre-feet, enabling the irrigation of 80,000 acres of land, with a duty of water at 3 acre-feet per annum. To attempt to reduce this charge would be impracticable, for to increase the reservoir draft or increase the duty of water to supply a greater area would be extremely hazardous." (Emphasis supplied.)

"* * *

"To be a success the reclamation charge per acre on an irrigation project and the annual operation and maintenance expense should have such a relation to the value of the crops produced as will permit the average irrigator a fair return on his labor and money

invested, under average-crop market conditions. Otherwise the dissatisfied rancher will eventually seek more profitable employment elsewhere and the land remain idle. The operation and maintenance charges remaining practically the same will fall more heavily on the remaining farmers, who in turn will be compelled to abandon the land and the project, and, if in corporate ownership, it will finally be forced into the hands of a receiver. This is the history of many irrigation projects when the charges have been too high, and it partly explains the failure of the organization previously formed to irrigate the lands in the vicinity of Florence by means of flood water."

Appendix II

VERBATIM QUOTATIONS.

From: House Document No. 791, 63d Congress, 2d Session,—otherwise known as, and referred to in the Act of May 18, 1916, 39 Stat. 123-130, and in the “Landowners’ Agreement with Secretary of the Interior, San Carlos Project”,—

“Report to the Secretary of War of a Board of Engineer Officers, United States Army, under Indian Appropriation Act of August 24, 1912, on the San Carlos Irrigation Project, Arizona”,

all as transmitted to The Speaker, House of Representatives, by the Secretary of War, with his letter of February 24, 1914. That letter printed at Page 5 of said Document No. 791 reads:

“To The Speaker, House of Representatives,

Washington, D.C.

Sir: Section 2 of the act approved August 24, 1912, making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, provides as follows:

That the Secretary of War be, and he hereby is, directed to convene a board of not less than three engineers of the Army of wide reputation and large experience to make the necessary examinations, borings, and surveys for the purpose of determining the reasonability and practicability of constructing a dam and reservoir at or in the vicinity of the Box Canyon, on the San Carlos Indian Reservation, known as the site of the pro-

posed San Carlos Reservoir on the Gila River, Arizona, and the necessary irrigation works in connection therewith to provide for the irrigation of Indian, private, and public lands in the Gila River Valley. Such board of engineers to submit to Congress the results of their examinations and surveys, together with an estimate of cost, with their recommendations thereon, at the earliest practicable date.

In accordance with that provision of law a board of engineer officers, including Lieut. Cols. W. C. Langfitt and C. H. McKinstry and Maj. Harry Burgess, was appointed September 19, 1912. The report of the board dated February 14, 1914, accompanied by photographs and drawings pertaining thereto and furnishing the information required by the act is submitted to Congress herewith.

Very respectfully,
Lindley M. Garrison,
Secretary of War."

QUOTATIONS FROM NUMBERED PARAGRAPHS.

"118. Diagram No. 7 shows that the reservoir formed by a dam 180 feet high to spillway would not have furnished 250,000 acre-feet through the dry period 1898-1904, and that the deficiencies in 1903 and 1904 would have been so great that *in the absence of an auxiliary pumping supply crops would have suffered*. This assumes that in 1902 the full draft of 250,000 acre-feet would have been taken, notwithstand-

ing that on January 1, 1902, the reservoir contained but 279,000 acre-feet of water.” (Emphasis supplied.)

“141. There are other advantages. The benefits of the project will be extended to a greater number of people, and the greater quantity of land with a water right of 2 acre-feet per acre will be better security to the Government for the cost of the project than would a smaller acreage with correspondingly larger water rights.

“*Again, all the farmers will be interested in increasing their security against drought by supplementing the stored water with water pumped from the underground supply; in lining ditches to reduce evaporation and seepage; and finally in entering upon desilting as soon as that becomes necessary—since any diminution in the supply of 2 acre-feet would be more acutely felt than would the same percentage of reduction in the case of a greater allowance per acre.*” (Emphasis supplied.)

“146. Messrs. Thackery and Olberg express the opinion that water from the San Carlos project should be furnished for 50,000 acres of land on the Indian reservation, being 10 acres per capita on the basis of a prospective population of 5,000, the population in 1912 being 3,996.”

“153. * * * The irrigation of the private lands will result in a certain quantity of water becoming available either at the surface or in wells on the reservation. It is impracticable to estimate the amount of this return flow, though on account of the high duty

of water assumed for this project, its percentage will be less than is usually counted on. Nor can it be known in advance whether this water will be of as good quality as the water originally applied. On account of these uncertainties the board does not include any return water in the supply to be furnished by the project to the Indian lands.”

“156. *Quality of lands and waters.*—In relation to the quality of the land and waters in this district, the board invites attention to the letter of Prof. R. H. Forbes, director of the Agricultural Experiment Station, University of Arizona, dated July 29, 1913, copy of which will be found in Appendix K and from which is quoted the following:

“* * *

“2. The well waters vary greatly in character, those along the Gila River being for the most part white alkaline in character, while those at a distance from the Gila River are for the most part black alkaline in character. A number of instances are observed where either black or white alkalies are contained in injurious excess; in other cases they are not contained in any damaging quantity. In cases of a large general development of the ground waters of the district through single or harmonious agencies, these waters should be so combined in irrigating that sodium carbonate and calcium sulphate contained may react in a manner improving the quality of the water.

“* * *”

“158. *There are irrigation wells in use near Florence and Casa Grande, and, as already pointed*

*out, on the reservation lands on the north side of the river opposite Sacaton. Water from the wells at the Sacaton Agency has been used for irrigation for a number of years. * * ** The quality of the ground water varies with the location of the wells, but there is sufficient evidence to show that at least in some wells in the Gila Valley the water is less alkaline than is the river water at very low stages. The board inspected crops of vegetables, corn, grain, and cotton at the experiment farm, Sacaton, growing in ground on which no water except that from the agency well had been used for six years. There was some appearance of alkali, but the farmer stated that all crops had done well during the six years in question. * * *” (Emphasis supplied.)

“159. Whatever might be the ultimate effect of using well water alone, no bad effects would follow the proper use of well water in conjunction with or supplementary to the river flow or stored river water. Some who have had experience with well water prefer to use it in conjunction with river water rather than to use river water alone. * * *”

“183. * * * The acreage suggested by Mr. Olberg of the Indian Service as that which will ultimately be required for the Pimas is 50,000, being 10 acres per capita for an assumed prospective population of 5,000. For such an area it is probable that the flow of the river would be needed up to a discharge so great as to practically require all waters, excepting in times of floods of some magnitude, to pass all lands now irrigated above the reservation.”

“189. *Alternative. projects.*—In case, as the result of adjudication, such a quantity of water is decreed to private lands that *the project becomes prohibitively expensive as a project for the irrigation of Indian and private lands, there remain two methods of providing irrigation water for the Pima Indians, viz., a storage project for the Indians alone and a flood-water project with or without a pumping reserve.* In the discussion of these projects the board is handicapped by lack of accurate knowledge as to the quantity of water required to satisfy rights other than those of the Indians. *In the storage project it will be assumed that the total quantity to be furnished yearly from the reservoir supply for all purposes is 100,000 acre-feet—87,500 for the Indians and 12,500 for private lands; that 250,000 acre-feet of capacity will be required in the reservoir for water storage and 187,500 acre-feet for 50 years of silt accumulations. This will necessitate a dam 155 feet high. Making reasonable reduction in the item of flowage damage in the estimate of the larger project, assuming the cost of a diversion dam at the reservation to be the same as that of the one figured on above Florence, and omitting the cost of the canals contemplated in the larger project, the cost will be about \$90 per acre. Desilting, when desilting became necessary, would amount to about \$8.50 per acre per year. The board considers these costs prohibitive.*” (Emphasis supplied.)

“190. * * * Such experience as has been had with wells is favorable to the assumption that underground

water within easy reach of pumps is available on both sides of the river; but there is no present means of knowing whether the underground supply will continue to furnish indefinitely 2 acre-feet per acre yearly for 40,000 acres of land. It is necessary, however, to estimate on a well and pump system capable of this duty on account of the long periods, sometimes several months in duration in which under existing conditions, which are assumed to continue, little or no water is obtainable from the river. * * *

“202. The board finds that the San Carlos irrigation project is entirely feasible from physical considerations.”

“203. The advisability of the project, as before stated, will depend on its cost as compared with the benefits to result from it.”

“204. The cost of the project per acre will depend upon the number of acres that can be taken under the project, and this upon the quantity of water physically and legally available.”

Appendix III

VERBATIM QUOTATIONS.

From: Printed Hearings before the Subcommittee of House Committee on appropriations. Seventieth Congress, First Session. Printed by Government Printing Office at Washington, D. C., 1928.

(The following appears from the Statement of Justification submitted to the Subcommittee by the Bureau of Indian Affairs, pages 276 through 279 inclusive.)

1. Page 277: *"The proposed San Carlos project, including the diversion project of 62,000 acres, will total approximately 100,000 acres, of which 80,000 acres will be supplied with gravity water and 20,000 acres will be supplied by pumps from underground sources in connection with drainage."* (Emphasis supplied.)

2. Pages 277 and 278:

"Summary of Work Remaining to Be Done.

"The work remaining to be done after the close of the fiscal year 1927 is very great and may be summarized as follows, the costs having been estimated as closely as possible in the absence of detailed surveys and plans:

- "1. Complete surveys and relocation of G.L.O. corners and the preparation of plans for the completed system of canals for the distribution of water, including a detailed estimate of cost of all features. This should at the same time include the collection of data

regarding all existing wells and pumping plants and a study of underground water conditions upon which to base plans for a comprehensive drainage system by means of pumps and other methods, estimated cost of surveys, plans, and estimates....\$50,000

* * * * *

“11. Construction of drainage system for entire project including purchase of existing plants and construction of new plants, but not including cost of power development and transmission lines, 100,000 acres at \$17\$1,700,000”

3. Page 279: “The balance of the drainage work should be carried on in accordance with the requirements as they develop.

“For the fiscal year 1929, \$485,000 is requested.

“Summary of areas that can be served under constructed and contemplated project works when water is available

Date	White		Indian		Total		Total
	Gravity	Pumped	Gravity	Pumped	Gravity	Pumped	
June 30, 1927	15,000	0	10,000	0	25,000	0	25,000
June 30, 1928	20,000	0	15,000	0	35,000	0	35,000
June 30, 1929	30,000	0	20,000	0	50,000	0	50,000
June 30, 1930	35,000	1,000	25,000	1,000	60,000	2,000	62,000
June 30, 1931	40,000	2,500	35,000	2,500	75,000	5,000	80,000
June 30, 1932	40,000	6,250	40,000	6,250	80,000	12,500	92,500
June 30, 1933	40,000	10,000	40,000	10,000	80,000	20,000	100,000”

Appendix IV

Act of Congress Approved March 7, 1928 (45 Stat. 200)

“(Public—No. 100—70th Congress)
(H. R. 9136)

“An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1929, and for other purposes.

“*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior for the fiscal year ending June 30, 1929, namely: * * *.”

“*For all purposes necessary to provide an adequate distributing, pumping and drainage system for the San Carlos project, authorized by the Act of June 7, 1924 (Forty-third Statutes, page 475), and to continue construction of and to maintain and operate works of that project and of the Florence-Casa Grande project; and to maintain, operate, and extend works to deliver water to lands in the Gila River Indian Reservation which may be included in the San Carlos project, including not more than \$5,000 for crop and improvement damages and not more than \$5,000 for purchases of rights-of-way, \$485,000: Provided, That in addition to the amount herein appropriated the Secretary of the Interior may also incur obligations and enter into contract for development of electrical*

*power at the Coolidge Dam as an incident to the use of the Coolidge Reservoir for irrigation, such contract not exceeding a total of \$350,000 and his action in so doing shall be deemed a contractual obligation of the Federal Government for the payment of the cost thereof: * * *.*

*“Provided further, That the Secretary of the Interior is authorized to accept the conveyance to the United States for the benefit of the San Carlos project of canals, reservoirs, *pumping plants*, water rights, lands, and rights of way, and he may pay for damage to crops and improvements incident to constructing project works: * * *”* (Emphasis supplied.)

Appendix V

Official Records of Bureau of Indian Affairs and San Carlos Irrigation and Drainage District Regarding San Carlos Project Irrigation and Drainage Well System.

1. Data covering San Carlos Project irrigation and drainage wells drilled, acquired and equipped at the end of the fiscal year 1936.

(a) Portion of San Carlos Project Annual Report. Fiscal year 1936. (Bureau of Indian Affairs) pages 11-13:

Data relating to irrigation and drainage wells drilled, acquired and equipped at the end of the fiscal year 1936 is as follows:—

Well No.	Year Drilled	Part of Project	Depth Drilled	Maximum Test G.P.M. & Lift	Pumping Equipment	
					Capacity	
1	1934	Florence	212	.....	1900 @ 100 ft.	
2	1934	"	216	.....	1900 " 100 "	
3	1934	"	212	.....	1900 " 100 "	
4	1934	"	220	2000 @ 115'	1900 " 100 "	
5	1934	"	350	4000 " 91	2500 " 90 "	
6	1935	"	138	3000 " 32	3000 " 80 "	
7	1935	"	162	1300 " 43	Not equipped.	
7A	1935	"	308	2600 " 40	2500 @ 80 ft.	
8	1934	"	212	3700 " 95	3000 " 80 "	10
9	1934	"	254	2400 " 75	2500 " 90 "	
10	1934	"	259	3400 " 78	3000 " 90 "	10
11	1934	"	290	2500 " 76	2500 " 90 "	
12	1935	"	181	1900 " 72	1900 " 100 "	
13	1934	"	230	4500 " 57	2500 " 80 "	
14	1920	"	312	.....	1400 " 100 "	
15	1934	Blackwater	212	4800 @ 76	3000 " 90 "	10
16	1924	Coolidge E.	208	.....	2500 " 80 "	
17	1934	"	350	1800 @ 89	1600 " 100 "	
18	1934	"	226	1900 " 89	1600 " 100 "	
19	1934	"	216	2200 " 82	1900 " 90 "	

Well No.	Year Drilled	Part of Project	Depth Drilled	Maximum Test G.P.M. & Lift	Pumping Equipment			
					Capacity		H.P.	
	1934	Coolidge E.	204	3200 @ 81	1900 @	90 ft.	50	
	1934	"	216	3300 " 72	3000 "	80 "	100	
	1934	"	305	2600 " 65	2500 "	80 "	75	
	1934	"	228	4200 " 67	3000 "	80 "	100	
	1934	"	256	4500 " 75	2500 "	90 "	75	
	1920	"	220	.....	1900 "	100 "	60	
	1934	"	406	2500 @ 70	2500 "	90 "	75	
	1934	Coolidge W.	260	2100 " 72	1900 "	90 "	60	
	1934	Coolidge E.	258	2600 " 68	2500 "	80 "	75	
	1934	Coolidge W.	200	2800 " 56	3000 "	90 "	100	
	1934	"	270	2800 " 60	3000 "	90 "	100	
	1934	"	421	2000 " 86	1900 "	100 "	75	
	1934	"	206	4000 " 67	3000 "	80 "	100	
	1934	Blackwater	192	4300 " 65	3000 "	80 "	75	
	1934	"	220	5400 " 72	3000 "	80 "	75	
	1934	"	250	4800 " 70	3000 "	80 "	100	
	1934	"	214	4000 " 87	2500 "	80 "	75	
	1934	"	222	4700 " 90	3000 "	80 "	100	
	1934	"	218	3500 " 95	2500 "	80 "	75	
	1934	"	220	4700 " 83	2500 "	80 "	75	
	1934	Coolidge W.	224	3400 " 94	2500 "	90 "	75	
	1930	Sacaton	176	3100 " 87	2500 "	90 "	75	
	1930	"	179	3100 " 91	2500 "	90 "	75	
	1930	"	176	1600 " 72	1400 "	70 "	40	
	1935	Diesel Plant	515	2000 " 85	1000 "	100 "	30	
	1934	Casa Blanca	376	1900 " 85	1400 "	100 "	50	
	1934	"	250	1500 " 91	Not equipped.			
	1934	"	164	3000 " 89	1900 @	80 ft.	50	
	1935	Sacaton	214	2400 " 105	1600 "	90 "	50	
	1935	"	250	2100 " 66	1900 "	80 "	50	
	1935	Casa Blanca	248	2300 " 34	3500 "	90 "	75	
	1935	"	158	2800 " 50	1600 "	80 "	50	
	1935	"	106	2300 " 47	1400 "	80 "	40	
	1935	"	174	2100 " 62	1400 "	80 "	40	
	1935	"	186	2600 " 36	1400 "	80 "	50	
	1935	"	160	2700 " 47	1200 "	80 "	40	
	1935	"	156	2400 " 43	1600 "	80 "	50	
	1935	San Tan	154	3500 " 70	2200 "	80 "	60	
	1935	"	210	1500 " 110	Not equipped.			
	1935	"	251	1000 " 100	Not equipped.			
	1935	"	206	1800 " 96	1200 @	80 ft.	40	
	1935	"	225	2100 " 65	1400 "	80 "	40	
	1935	"	202	2100 " 67	1400 "	90 "		
	1935	"	202	2100 " 58	1600 "	80 "	50	
	1935	Southside Area	210	3500 " 75	2500 "	80 "	75	
	1935	"	252	4200 " 72	3000 "	80 "	75	
	1935	"	230	4000 " 55	3000 "	80 "	75	

Well No.	Year Drilled	Part of Project	Depth Drilled	Maximum Test G.P.M. & Lift	Pumping Equipment	
					Capacity	H.P.
73	1920	Coolidge E.	216	1900 @ 80	1600 @ 100 ft.	60
74	1924	"	224	.....	2200 " 90 "	75
75	1920	"	200	.....	1900 " 90 "	60
76	1935	"	616	1500 @ 115	Not equipped.	
77	1934	Casa Grande	304	1600 " 84	1400 @ 90 ft.	50
78	1934	"	290	1300 " 123	Not equipped.	
80	1934	"	248	2500 " 81	2200 @ 90 ft.	75
81	1934	"	216	2600 " 62	3000 " 90 "	100
82	1934	"	225	1100 " 116	1000 " 110 "	40
83	1934	"	268	2000 " 94	1600 " 110 "	60
84	1934	"	244	1500 " 114	1000 " 100 "	40
85	1935	"	250	800 " 100	Not equipped.	
86	1934	"	240	1300 " 118	1000 @ 100 ft.	40
87	1936	"	102	2200 " 60	1600 " 80 "	50
90	1934	"	244	1500 " 96	1000 " 100 "	40
91	1934	"	238	1600 " 85	1200 " 90 "	40
92	1934	"	310	1200 " 109	1000 " 100 "	40
93	1934	"	316	1600 " 80	1400 " 90 "	50
97	1934	"	242	1600 " 93	1400 " 90 "	50
98	1934	Southside Area	230	5700 " 57	3000 " 90 "	100
99	1934	"	168	5300 " 53	3500 " 80 "	75
00	1934	Casa Grande	174	400 " 80	Not equipped.	

United States
Department of the Interior
Bureau of Indian Affairs

Date: October 27, 1955

Pursuant to Title 28, section 1733, United States Code, I hereby certify that each annexed paper is a true copy of a document comprising part of the official records of the Bureau of Indian Affairs, Department of the Interior, in my custody:

A portion of the San Carlos Project Annual Report. Fiscal year 1936.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Bureau of Indian Affairs to be affixed on the day and year first above written.

/s/ N. G. Murray

(Signature)

Administrative Officer

(Title)

(Seal of Bureau of Indian Affairs)

2. Cost Records covering expenditures for drilling, equipping and acquiring San Carlos Project irrigation and drainage wells.

(a) San Carlos Project Monthly Summary
Cost Report—Month of June, 1952. (Bureau of Indian Affairs):

United States
Department of the Interior
Bureau of Indian Affairs
Irrigation Service

PROJECT MONTHLY SUMMARY COST REPORT

459.57 San Carlos Project

Month of June,

Code No.	Principal Feature	1-1 to 6-30-52	F. Y. 1952	Total to Date
	Joint Works—Irrigation			
101	Plant in Service			
	Coolidge Dam & Reservoir			5,516,170
	Rice Station Power & Irrig.			92,284
	Amhurst-Hayden Dam			251,577
	Main Canal Heading			141,467
	Northside Canal			171,088
	Main Canal			559,809
	Pima Lateral to Res'n. Line			272,730
	Picacho Reservoir			20,500
	Drainage			710,838
	Stormwater Channels			75
	Stream Gauging			27,957
	Gila River Adjudication Suit			15,721
	Roads, Buildings & Grounds			86,121
	Telephone Lines			23,431
	Dist. System—White Lands			1,040,531
	Dist. System—Indian “			1,585,901
	Dist. No. 4 Office Expense			64,761
	Buckeye & Arlington Canal Settlement			114,401
	Buttes Dam			97,661
	Irrigation Wells (San Carlos Irrig. and Drainage Dist.)			328,831
	Rehab. Irrig. Wells & Pump	45,372.28	176,770.48	260,667
	Totals	45,372.28	176,770.48	11,383,221

(b) San Carlos Project Operating Statement,
Irrigation Construction. Fiscal year 1953.
(Bureau of Indian Affairs):

Bureau of Indian Affairs
Operating Statement

Location: Phoenix
Agency: San Carlos
Activity: Irrigation (Construction)

Fiscal Year: 1953
Period: 7/1/52-6/30/53
Operating Unit: Irrigation
Project No. 57

Program Status			
Account Title	Initial (1)	Revised (2)	To Date (3)
OPERATING EXPENSE:			
Construction of Picacho Reservoir	300,000.00		
Personal Services 9,500.00			
Other Expense 290,500.00			
51 Deep Wells and Pumping Plant			3,263.22
64 Accessory Elec. Equipment			1,057.59
83 General Property			153.48
50 Land and Land Rights			118.70
92 Engineering Plans and Surveys			24.65
95 Facilitating Services			3,500.00
distributed Costs—obligation for			
/10 of PP No. 14			357.42
Total	300,000.00		8,475.06



(c) San Carlos Project Operating Statement, Irrigation Construction. Fiscal year 1954. (Bureau of Indian Affairs):

BUREAU OF INDIAN AFFAIRS
OPERATING STATEMENT

Area: Phoenix

Fiscal Year 1954

Agency: San Carlos Project

Period: 7/1/53-6/30/54

Activity: Irrigation Construction

Operating Unit 459

Project No. 594 - San Carlos Project

	Program Status		
	Initial	Revised	To Date
<u>W/O No. 623</u>			
Deep Wells and Pumping Plants			
51 Structures and Improvements	191,000.00		72,973.00
<u>W/O No. 624</u>			
Reservoirs, Dams, and Diversion Works			
50 Land and Rights	88,000.00		587.00
51 Structures and Improvements	209,685.87		322.00
	297,685.87		
<u>W/O No. 625</u>			
Engineering Plans and Surveys			
95.1 Facilitating Admin. Services	2,975.00		2,975.00
<u>W/O No. 630</u>			
Deep Wells and Pumping Plants			
51 Structures and Improvements	5,000.00		
<u>W/O No. 635</u>			
Reservoirs, Dams, and Diversion Works			
50 Land and Rights	333.75		300.00
Total.....	496,994.62		77,158.00

(d) San Carlos Project Operating Statement, Irrigation Construction. Fiscal year 1955. (Bureau of Indian Affairs):

BUREAU OF INDIAN AFFAIRS
OPERATING STATEMENT

AREA Phoenix

FISCAL YEAR 1955

AGENCY San Carlos Project

PERIOD 7/1/54 - 6/30/55

ACTIVITY Irrigation Construction

OPERATING UNIT No. 1

	PROGRAM STATUS		
	Initial	Revised	To Date
Outstanding Obligations, 1954	31,583.86	31,583.86	31,659.00
<u>Work Order No. 931 (1955)</u>			
02 Reservoirs, Dams and Diversion Works			
50 Lands and Rights	297,000.00	87,500.00	3,384.00
51 Structures and Improvements		209,275.00	5,323.00
<u>Work Order No. 932 (1955)</u>			
02 Reservoirs, Dams and Diversion Works			
51 Structures and Improvements	80,000.00	80,000.00	303.00
<u>Work Order No. 933 (1955)</u>			
04 Deep Wells and Pumping Plants			
51 Structures and Improvements	87,700.00	174,190.00	74,196.00
<u>Work Order No. 934 (1955)</u>			
04 Deep Wells and Pumping Plants			
51 Structures and Improvements	5,000.00	5,000.00	1,783.00
<u>Work Order No. 936 (1955)</u>			
20 Engineering Plans and Surveys			
95.1 Administrative Services	2,271.34	3,060.00	3,060.00
<u>Work Order No. 937 (1955)</u>			
17 General Property			
65 Movable Equipment	60,000.00	63,000.00	3,007.00
TOTAL.....	531,971.34	622,026.00	122,718.00

*Note: The cost figures marked * on foregoing records 2 a, 2 b, 2 c and 2 d, total the sum of \$1,453,610.43 expended in construction and acquisition of project irrigation and drainage well system.



(e) San Carlos Project Pumps - Well numbers, Location, Remarks. Revised 6/1/55. (Bureau of Indian Affairs):

Project Pumps					Project Pumps				
Well No.	Location			Remarks	Well No.	Location			Remarks
	Sec	Twp	Rng			Sec	Twp	Rng	
1	28	4	10	Active	71	15	5	7	Active
2	29	4	10	Active	72	9	5	7	Active
3	32	4	10	Active	73R	36	5	8	Active
4	31	4	10	Active	74R	35	5	8	Active
5	31	4	10	Active	75	23	5	8	Abandoned - Filled
6	7	4	11	Active	76	29	5	9	Test Well - Domestic
7	7	4	11	Capped	77R	29	6	8	Active
7aR	12	4	10	Active	78	35	6	9	Abandoned - Caved in
8	26	4	9	Active	79	15	5	9	Active
9	28	4	9	Active	80	29	6	8	Active
10	28	4	9	Active	81	28	6	8	Active
11	29	4	9	Active	82	30	6	8	Active
12	16	4	10	Active	83	25	6	7	Active
13	1	5	8	Active	84	35	6	7	Abandoned - Domestic
14R	3	5	8	Active	85	34	6	7	Active
15	12	5	7	Capped	86	34	6	7	Active
16	14	5	8	Active	87	25	6	5	Capped
17	30	5	9	Active	88	31	6	6	Active
18	25	5	8	Active	89	6	6	9	Capped
19R	24	5	8	Active	90	1	7	6	Active
20	13	5	8	Abandoned - Domestic Pump	91	2	7	6	Capped
21	14	5	8	Active	92	28	6	6	Active
22	15	5	8	Active	93	28	6	6	Active
23R	23	5	8	Active	94	4	3	5	Active
24	26	5	8	Active	95	4	3	5	Active
25	24	5	8	Abandoned - Filled	96				Number not used
26	25	5	8	Active	97R	30	6	8	Active
27	17	5	8	Active	98	22	5	7	Active
28R	25	5	8	Active	99R	13	5	7	Active
29	16	5	8	Abandoned - Filled	100	23	6	5	Capped NE
30	17	5	8	Active	101	27	6	6	Abandoned - Filled
31	17	5	8	Active	102	34	6	6	Active
32	12	5	7	Active	103R	33	6	6	Active
33	7	5	8	Active	104	6	7	6	Abandoned - Domestic
34	1	5	7	Active	105	36	6	5	Capped
35	36	4	7	Active	106	25	6	5	Active
36	35	4	7	Active	107				Number not used
37	35	4	7	Active	108				Number not used
38	34	4	7	Active	109				Number not used
39	36	4	7	Active	110	12	5	9	Active
40	15	5	8	Active	111	19	5	9	Active
41	9	5	7	Active	112	22	5	9	Active
42	20	4	7	Abandoned - Filled NE	113	32	5	9	Active
43	15	4	6	Active	114	6	6	9	Active
44R	7	4	6	Active	115	32	6	7	Active
45	18	4	7	Active	116	31	6	7	Active
46	24	4	6	Active	117	6	7	7	Active
47	23	4	6	Active	118	34	6	6	Active
48	3	4	6	Active	119	4	5	7	Active
49	12	4	5	Active	120	18	4	7	Active
50	10	5	8	Diesel Plant Pump	121	4	4	5	Active
51	3	4	5	Active	122	5	4	5	Capped
52R	22	5	7	Active	123	1	4	4	Active
53	2a	3	5	Active	124	7	4	5	Active
54	16	4	6	Active	125	6	4	5	Active
55	8	4	6	Active	126	1	4	4	Active
56	7	4	6	Active	127	3	7	6	Active
57	34	3	5	Active	128	32	6	7	Active
58	32	3	5	Active	129R	31	5	9	Active
59	29	3	5	Active	130	5	5	8	Active
60	31	3	5	Active	131	34	3	4	Active
61	36	3	4	Active	191	19	5	9	Active
62	25	3	4	Active	201	20	5	9	Active
63	3	4	6	Capped					
64	33	3	6	Capped NE					
65	21	3	6	Capped NE					
66	5	4	6	Active					
67	31	3	6	Active					
68	25	3	5	Active					
69	24	3	5	Active					
70	22	5	7	Active					

1-Replacement Well
R-Never Equipped

Revised 6-1-55

United States
Department of the Interior
Bureau of Indian Affairs

Date: October 27, 1955

Pursuant to Title 28, section 1733, United States Code, I hereby certify that each annexed paper is a true copy of a document comprising part of the official records of the Bureau of Indian Affairs, Department of the Interior, in my custody:

1. San Carlos Project Monthly Summary Cost Report. Month of June, 1952.
2. San Carlos Project Operating Statement, Irrigation Construction. Fiscal year 1953. Period 7/1/52-6/30/53.
3. San Carlos Project Operating Statement, Irrigation Construction. Fiscal year 1954. Period 7/1/53-6/30/54.
4. San Carlos Project Operating Statement, Irrigation Construction. Fiscal year 1955. Period 7/1/54-6/30/55.
5. San Carlos Project Pumps — Well numbers, Location, Remarks. Revised 6/1/55.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Bureau of Indian Affairs to be affixed on the day and year first above written.

/s/ N. G. Murray

(Signature)

Administrative Officer

(Title)

(Seal of Bureau of Indian Affairs)

3. Records of quantities of groundwater pumped and delivered to irrigation laterals by San Carlos Project irrigation and drainage pumping system during period 1934-1954.

(San Carlos Irrigation and Drainage District)

(a) Pumped Waters of San Carlos Project:

PUMPED WATERS OF SAN CARLOS PROJECT

QUANTITIES PUMPED AND DELIVERED
TO IRRIGATION LATERALS BY PROJECT IRRIGATION
AND DRAINAGE PUMPING SYSTEM DURING
CALENDAR YEARS 1935 THROUGH 1954

<u>Year</u>	<u>Total Pumped (Acre Feet)</u>
1934	40,423
1935	66,878
1936	108,103
1937	70,202
1938	102,759
1939	102,955
1940	98,564
1941	55,867
1942	99,542
1943	91,114
1944	113,202
1945	102,190
1946	99,640
1947	122,263
1948	130,290
1949	117,862
1950	142,450
1951	99,592
1952	101,549
1953	117,104
1954	97,100
Total	2,079,649

I hereby certify that the foregoing paper entitled "Pumped Waters of the San Carlos Project" is a true copy of a document comprising part of the official records of the San Carlos Irrigation and Drainage District, in my custody.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the San Carlos Irrigation and Drainage District to be affixed this 28th day of October, 1955.

W. S. Gookin

(Signature)

District Engineer

(Title)

(Seal of San Carlos Irrigation and
Drainage District)

Appendix VI

Sec. 130.69 e (b), Title 25—Indians, 1949 Edition,
Code of Federal Regulations. Page 153:

“130.69e *Delivery of water and operation and maintenance charges for district lands and works.* * * *”

“(b) The district, in accordance with the repayment contract, shall deliver 2 acre-feet of water or such part thereof as may be legally and physically available, to each irrigated acre in the district on payment of its said basic charge and any other charges due the district or the United States under the provisions of the landowners' agreement and the repayment contract: *Provided*, That all sums due the United States provided for in this section shall have been paid by the district in accordance with the provisions of this part and the terms of the repayment contract; all additional water, except free water, as provided for in the repayment contract shall be paid for by the landowners and collected by the district, at the rate of 50 cents per acre-foot for the third acre-foot per acre and at the rate of \$1.00 per acre-foot for all additional water delivered, but the Secretary retains the right to change at any time the charge for excess water.”

Appendix VII

Act of Congress Approved March 7, 1947. (61 Stat. 8)

“[PUBLIC LAW 10—80TH CONGRESS]

[CHAPTER 10—1ST SESSION]

[S. J. Res. 60]

JOINT RESOLUTION

“To authorize the San Carlos Irrigation and Drainage District, Arizona, to drill, equip, and acquire wells for use on the San Carlos irrigation project.

“Whereas the San Carlos irrigation project, Arizona, has been constructed under authority of the Act of June 7, 1924 (43 Stat. 475), as supplemented and amended; and

“Whereas a contract has been executed pursuant to such legislative authority between the Secretary of the Interior and the San Carlos Irrigation and Drainage District providing for the repayment of the proper share of the cost of project irrigation works by the San Carlos Irrigation and Drainage District on behalf of project lands in private and public ownership; and

“Whereas, at the beginning of the 1947 irrigation season, due to extended drought, there is virtually a complete lack of surface and reservoir water supply on the project for the irrigation of the lands of the district and the Pima Indians of the Gila River Indian Reservation, thus creating an emergency: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be constructed an extension of the system of wells and pumping works of the San Carlos irrigation project, including the enlargement, rehabilitation, and repair of the present pumping and drainage works of the said project, and in order to expedite and assist the accomplishment thereof, the San Carlos Irrigation and Drainage District, is hereby authorized, (1) to develop underground water within and without the area of the San Carlos Irrigation project exclusively for use as a part of the common stored and pumped water supply of said project; (2) to drill irrigation wells within and without the project area necessary for making underground waters available exclusively for use on all lands of the project, and equip the same with pumping facilities and equipment, including the deepening, replacement, and repair of existing project wells and equipment; and (3) to purchase with the consent of and under agreement with the owner thereof and to develop privately owned wells within or adjacent to the project areas, together with rights of way necessary to the operation of such wells: *Provided*, That the cost of the wells, exclusively for use as part of the common stored and pumped water supply of said project, equipment, and pumping works herein authorized to be constructed or acquired shall not exceed the sum of \$380,000 and, within that limit, such cost shall be deemed a project charge to be distributed equally per acre over both the Indian lands and the lands in public and private ownership within the San Carlos irri-

gation project, and shall be repayable to the United States in accordance with existing law: *Provided further*, That the Secretary shall, at the earliest practicable date, enter into an agreement with the San Carlos Irrigation and Drainage District, which agreement shall describe the scope and extent of the work to be done by the district, the plans and specifications therefor, and such other provisions, in conformity herewith, as may be agreed upon between the Secretary and the district: *Provided further*, That the San Carlos Irrigation and Drainage District shall be reimbursed for costs expended by it in the construction and acquisition of such wells, equipment, and pumping works; and the Secretary is hereby authorized to make such reimbursement: First, by releasing the district from the payment of construction charges due the United States annually by the district under the repayment contract executed pursuant to said Act of June 7, 1924, as amended, as such charges become due and payable, until the amount of the payments so released shall equal the total amount of the funds certified under oath by the district as having been expended by it for the construction and acquisition of wells and equipment under the terms of the agreement provided for herein, the first of such annual payments so to be released by the Secretary being that due from the district on December 1, 1947; or second, by paying to the district the full amount of the funds so certified as expended by it in the work authorized to be done, or any balance thereof not otherwise paid as hereinabove provided, out of appropriations hereafter made by Congress for this purpose; and there

is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$380,000, or so much thereof as may be necessary, to carry out the purposes of this joint resolution.

Approved March 7, 1947."

No. 14718

In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,	} <i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

BRIEF OF APPELLANT IN ANSWER TO
THAT OF AMICUS CURIAE

KRAMER, ROCHE & PERRY
Central & Washington Bldg.
Phoenix, Arizona
Attorneys for Appellant

FILED

DEC 30 1955

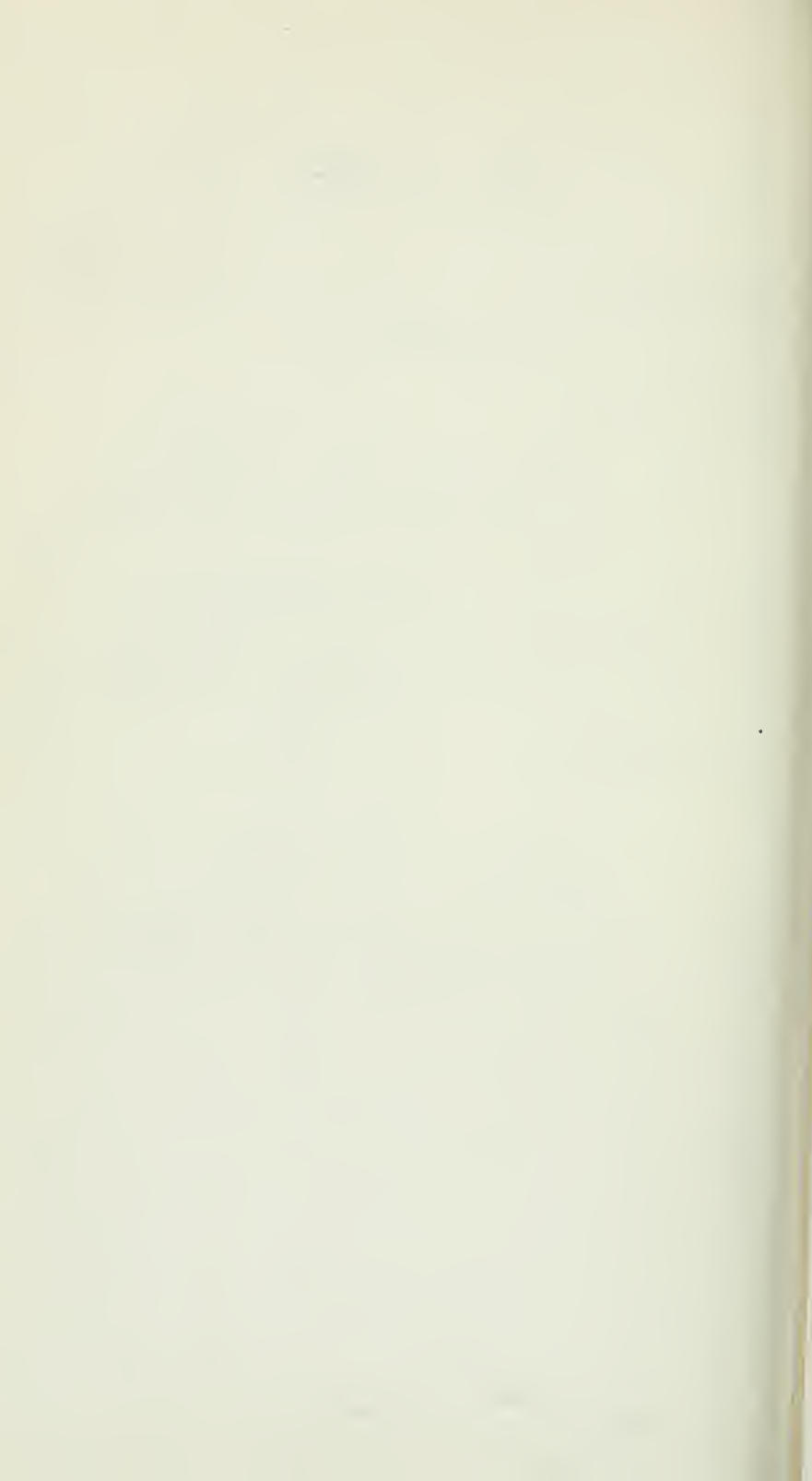
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In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,	} No. 14718
vs.	
UNITED STATES OF AMERICA,	
<i>Appellant,</i>	
<i>Appellee.</i>	

BRIEF OF APPELLANT IN ANSWER TO
THAT OF AMICUS CURIAE

PREFACE

As it appears to appellant, upon reading the brief of amicus curiae, such friend of the court desires several questions determined upon this appeal.

If agreeable to the court and to appellee, appellant would join in the request that such matters be so determined.

In fact, either correctly or incorrectly, appellant had understood this to be a "test case" to determine whether or not appellant had the right, without contrary directive of the Secretary of the Interior, to operate his pump and well for the purpose of irrigating his farm.

If that question can properly be determined here it will, as suggested by *amicus curiae*, settle the controversy as to whether the right of a landowner to pump underground water for irrigation from below his own land, is permissible in the absence of a prohibition by the Secretary of the Interior.

Prefatory to argument, it may be observed that plaintiff's "Exhibit B" (Tr. 51 et seq.), the so-called "repayment contract", was considered as in evidence by stipulation of the parties (Tr. 125).

It was not referred to in the opening brief of the appellant for the reason that, if correctly understood by appellant, the record is devoid of any suggestion appellant, or any of his predecessors in interest, was a party thereto. However, if the other parties in interest and the *amicus curiae* desire it be discussed herein, appellant is willing.

Of course, many questions might have been raised upon this appeal in accordance with the "statement of points" filed by appellant (Tr. 133 et seq.), determination of which would not have settled the points now suggested by *amicus curiae*. Many of these were waived or abandoned by appellant in the hope of a determination of the real meaning of the "Landowners' Agreement", "Exhibit A", (Tr. 20 et seq.).

Appellant has nothing to add to the first two sections of the argument contained in his opening brief, but will endeavor to discuss the other points as suggested by *amicus curiae*.

SUMMARY OF ARGUMENT

1. The "Repayment Contract", "Exhibit B", (Tr. 51) is definitely a written memorandum of the agreement arrived at between appellee and amicus curiae.

2. The remedy of the appellee and amicus curiae, if there has been a violation of the Gila River Decree, is by motion to enforce such decree and not by an independent suit for injunction.

ARGUMENT

1. The "Repayment Contract", "Exhibit B", (Tr. 51) is definitely a written memorandum of the agreement arrived at between appellee and amicus curiae.

Amicus curiae in support of its argument on behalf of the appellee relies heavily upon the "Repayment Contract" entered into between it and the United States under date of June 8, 1931 ("Exhibit B", Tr. 51) and states in effect that the present friend of the court was the agent of appellant in the execution of such contract, but it is to be noted that such "Repayment Contract" (Tr. 78, 79) confirms and adopts the "Landowners' Agreement" ("Exhibit A", Tr. 20) by which the rights of the parties to this appeal are to be determined.

Therefore, appellant most respectfully insists that if the argument contained at pages 5 to 12 of his opening brief herein is correct, then the judgment in this case should be reversed.

Can it be successfully contended that the United States of America and San Carlos Irrigation & Drainage District can effectively enter into a contract abrogating the rights of Paul Brophy under the "Landowners' Agreement"?

To appellant, it appears that the so-called "Repayment Contract" can in no case change or modify the rights of the active parties to this litigation as set forth in the "Landowners' Agreement". This was the position of appellant in the court below and he has not departed therefrom.

- 2. The remedy of the appellee and amicus curiae, if there has been a violation of the Gila River Decree, is by motion to enforce such decree and not by an independent suit for injunction.**

Contrary to the decision of the Supreme Court of Arizona in *Taylor v. Tempe Irrigating Canal Company*, 21 Ariz. 574, 193 P. 12, cited upon page 14 of the opening brief of the appellant herein, amicus curiae asserts the United States, by an independent action for injunction, may enforce the terms of the Gila River Decree heretofore entered by the United States District Court for the District of Arizona and relies somewhat upon *Wyoming v. Colorado*, 298 U. S. 573, 56 S. Ct. 912, 80 L. Ed. 1339.

Counsel for appellant have examined the report of the *Wyoming v. Colorado* decision in accordance with the citation and also the prior decision upon motion to dismiss, 286 U. S. 494, 52 S. Ct. 621, 76 L. Ed. 1245.

It does not appear the objection here presented was raised or determined there.

Sain v. Montana Power Comanpy, 84 F. 2d 126, decided by the Court of Appeals for the Ninth Circuit in 1936, and quoted upon page 34 of the brief of the amicus curiae, might be authority for the contention by such friend of the court, were it not for the difference between the Montana statutes and decisions and those of Arizona. To appellant it appears the following language employed by Chief Judge Denman in the *Sain* decision points up the difference between the Montana rule and that applicable to Arizona as shown by the *Taylor* case:

“The fact that a permanent injunction was rendered is said to indicate that cause 1953 is still pending in the Montana state court, and that therefore the federal court should leave the parties to obtain adjudication and relief in such pending cause. To the contrary, it has been held by the Supreme Court of Montana that a proceeding in contempt for violation of an injunction is distinct from the cause of action in which the injunction was rendered. (Citing cases)

“The Montana cases recognize that, in disputes over water rights between parties whose rights on the stream in question have been previously adjudicated and settled by permanent injunction, it is competent for injured parties to bring actions distinct from the cause in which the injunction was issued. (Citing cases). Where a particular remedy afforded in a state proceeding is not held by the state court to exclude an independent action seek-

ing a remedy for the same wrong, the federal courts may entertain such an independent action, provided requisites of federal jurisdiction are present. (Citing cases)”

CONCLUSION


Appellant most respectfully reiterates that the language employed in the “Landowners’ Agreement” permits of no other construction than that which appellant has placed upon it; neither the “Repayment Contract” nor the Gila River Decree in any way modify the language wherein appellant “agrees not to drill or operate wells . . . for irrigation . . . contrary to any rules, orders or regulations promulgated by the Secretary of the Interior”, and there has been no rule, order or regulation of the Secretary of the Interior prohibiting or restricting the use of the pump and well here referred to.

It is believed, therefore, the judgment here upon appeal should be reversed with appropriate directions.

Respectfully submitted,

KRAMER, ROCHE & PERRY
Central & Washington Building
Phoenix, Arizona

Attorneys for Appellant

By ALLAN  PERRY

No. 14718

**In the United States Court of Appeals
for the Ninth Circuit**

PAUL M. BROPHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**MOTION TO STRIKE
AND
MEMORANDUM IN SUPPORT**

FILED

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PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

PAUL M. BROPHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

MOTION TO STRIKE

Comes now the United States of America acting by and through J. LEE RANKIN, Assistant Attorney General, and WILLIAM H. VEEDER, Attorney, Department of Justice, and moves:

To strike the "Amicus Curiae Brief" and the "Brief of Appellant in Answer to that of Amicus Curiae."

There were received in the Department of Justice from counsel for the Appellant on January 3, 1956, and from the United States Attorney on December 30, 1955, copies of the Brief of Appellant In Answer to That of Amicus Curiae, the effect of which, when read in the light of the Brief of Amicus Curiae, would inject in this appeal issues entirely foreign to the appeal, concerning which Appellant has not sought review.

WHEREFORE, the United States of America respectfully moves this Honorable Court to strike both the Brief of Amicus Curiae and Appellant's Brief in Answer to that of Amicus Curiae, all as more fully reviewed in the accompanying memorandum of points and authorities in support of this motion.

Dated this 5th day of Jan, 1956.

UNITED STATES OF AMERICA,

18/ J. Lee Rankin

J. LEE RANKIN,

Assistant Attorney General.

18/ William H. Veeder

WILLIAM H. VEEDER,

Attorney, Department of Justice.

**In the United States Court of Appeals
for the Ninth Circuit**

PAUL M. BROPHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO STRIKE**

FACTS

PRELIMINARY STATEMENT

This Honorable Court is respectfully requested to consider the Motion to Strike and this memorandum in support of that motion in the light of the following facts:

1. The United States of America, Appellee, in accordance with the rules of this Honorable Court responded fully to the Opening Brief of Appellant;
2. No reply to the brief of the United States of America was filed by Appellant;
3. Amicus Curiae, subsequent to the filing of the response by the United States of America, filed a brief injecting matters into this appeal which Appellant did not raise on appeal;
4. Though no reply to the Brief for the United States, Appellee, was filed by Appellant, there never-

theless was received in the Department of Justice from Appellant on January 3, 1956, and from the United States Attorney on the 30th day of December, 1955, the Brief of Appellant in Answer to That of Amicus Curiae, purporting to join issue with Amicus Curiae respecting matters entirely foreign to this appeal. The brief of Amicus and Appellant's reply to Amicus purport to change completely the nature of the appeal and to request this Court for an advisory opinion respecting matters which are not before it.

Engendered by Amicus and Appellant by the course which they have pursued as a result which can have no other effect than severely to prejudice the interests of the United States of America, Appellee, and confuse the issues before this Court upon appeal.

QUESTION PRESENTED

Whether Amicus Curiae and Appellant may have resolved by this Court issues which are not presented on appeal?

ARGUMENT

Amicus curiae by its brief and appellant by the reply to it have joined issue respecting matters not before this Court and request an advisory opinion on three questions which are not presented on appeal

That advisory opinions may not be rendered by the Federal judiciary has been declared by the highest Court in these explicit terms: "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are sub-

ject to later review or alteration by administrative action.”¹ When the express questions by Amicus are subsequently reviewed it will be observed how clearly response to them would be violative of the last quoted doctrine. Comment respecting other facets of that sound principle which prohibits advisory opinions of the character sought here warrants consideration. Basis for the prohibitory rule is the provision of the Constitution establishing the Judicial Branch of the Central Government. There it is provided that: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”² Provision is further made that: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”³

Chief Justice Marshall very early in our country’s history reviewed the provisos of the organic law which have just been quoted, discussing in great detail the

¹ *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U. S. 103, 114 (1948).

² Constitution of the United States, Article III, Section 1.

³ Constitution of the United States, Article III, Section 2.

effect of them and declaring against advisory opinions by the Constitutional Courts of our Nation.⁴ That case has been frequently cited and is authority for the principle that the Federal Judiciary established pursuant to the Constitution may exercise its Constitutional powers only “* * * when a proper case between opposing parties was submitted for judicial determination; * * *.”⁵ Innumerable other cases reiterate and reaffirm that tenet of the law leaving no doubt as to its immutability.⁶

Irrespective, however, of the fact that this Court could not render an advisory opinion, these questions, extraneous to the appeal, are presented to it by Amicus for review:

“(1) Do applicable contracts, legislation and Court decree relating to the San Carlos Project in and of themselves prohibit a landowner of that project from drilling and operating his own individual irrigation well on the lands of such project, or may the project landowner perform such acts except when prohibited from doing so by express order, rule or regulation of the Secretary of the Interior?”⁷

That quoted question is neither before this Court on appeal nor is it relevant. Appellant admits that the Landowners’ Agreement prohibits the drilling and operation of a well of the character giving rise to this

⁴ *Marbury v. Madison*, 5 U. S. 137, 172 et seq. (1803).

⁵ *Muskra v. United States*, 219 U. S. 346, 357 (1910).

⁶ *United Public Workers of America v. Mitchell*, 330 U. S. 75, 89 (1947); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 423 (1940).

⁷ Amicus Curiae Brief, page 9, question 1.

litigation, asserting, however, that the prohibition contained in that document becomes effective only when a valid regulation or order has been promulgated by the Secretary of the Interior, the promulgation of which, asserts the Appellant, has not taken place.⁸

Controlling, however, is this fact:

The trial court adjudged and decreed that
 “The ‘Landowners Agreement’ itself, when construed in the light of the statutes and contracts providing for the construction of San Carlos Project, *without any implementing orders or regulations made by the Secretary of the Interior, makes it unlawful for the defendant to drill or operate a well for irrigation purposes.*”⁹
 [Emphasis supplied.]

That conclusion of law is not presented for review on appeal. Rather as pointed out in the brief of the United States, Appellee, the Appellant alludes only to the “Landowners Agreement” choosing to ignore the fact that the trial court based its conclusion upon not only the “Landowners Agreement” but upon all the contracts and laws which relate to the irrigation project in question.¹⁰

This is the second inquiry Amicus presents to the Court for an advisory opinion:

“(2) If the drilling and operation of such a well is proper in the absence of prohibition by Secretarial order, rule or regulation, has the Secretary of the In-

⁸ Appellant’s Opening Brief, Specification of Error, page 4.

⁹ R. 115, Conclusion of Law No. 5.

¹⁰ Please refer to Brief of the United States, Appellee, pages 8 and 9.

terior made such an order, rule or regulation with reference to appellant's well?"¹¹

Let this fact be respectfully emphasized as the complete answer to the question presented by Amicus: The trial court has rendered an opinion answering it affirmatively.¹²

There is unchallenged a judgment of the trial court from which Appellant has not appealed, declaring in unequivocal terms that Appellant is prohibited by the Landowners' Agreement itself from drilling the well giving rise to this litigation—that the Landowners' Agreement in the light of the statutes and contracts providing for the construction of the San Carlos Project "*makes it unlawful for the defendant [appellant] to drill or operate a well for irrigation purposes*"; that irreparable and continuing injury and damage to the United States of America emanates from the unlawful drilling of the well by Appellant causing to be entered an injunction against the Appellant.¹³

Finally Amicus presents this question, no mention of which is made in Appellant's brief:

"(3) Did the lower Court have jurisdiction to entertain this action?"¹⁴

Response to that question is, of course, set forth in the brief of the United States of America, Appellee,¹⁵ where the act conferring jurisdiction on the trial

¹¹ Amicus Curiae Brief, page 10, question 2.

¹² See Conclusion of Law No. 5, R. 115, set forth immediately above.

¹³ R. 114, Finding of Fact No. 11.

¹⁴ Amicus Curiae Brief, page 10, question 3.

¹⁵ Brief for the United States, Appellee, page 1.

court is in part quoted as follows: “* * * the district courts shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States * * *.”¹⁶ That the United States “commenced” the suit cannot be denied; equally clear is the fact that judgment was entered by the trial court in favor of the United States enjoining the irreparable damage caused by Appellant.

Amicus curiae alludes to and relies upon matters outside of the record which have no bearing in this appeal

Throughout the brief of Amicus Curiae references are made to purported excerpts from Congressional reports and other sources relating to the San Carlos Federal Irrigation Project.¹⁷ October 27, 1955, is the date of certain material included in the brief of Amicus Curiae and relied upon by it.¹⁸ As judgment for the United States of America was entered August 27, 1954, those extraneous matters are not and could not be relevant at this time. Further that and the related data contained in the appendices, which is largely legislative history, is in no way germane to the issues presented by Appellant on this appeal. Those issues are spelled out with clarity in the Specification of Error contained in Appellant’s brief. They are:

“The District Court erred in rendering judgment in favor of the plaintiff and in denying defendant’s motion for new trial because:

“(a) The amended complaint fails to state a claim upon which relief can be granted; and

¹⁶ 28 U. S. C. 1345.

¹⁷ Appendices I, II, III, IV and V.

¹⁸ Appendix V.

“(b) The ‘Landowners’ Agreement’ (‘Exhibit A’ annexed to plaintiff’s amended complaint, Tr. 20–50) contains no prohibition against the installation and operation of the defendant’s well and pump, unless and until there shall have been promulgated a valid regulation or order by the Secretary of the Interior prohibiting or restricting the use of such well and pump; and there has been no such regulation or order.”¹⁹

Emphasized by the United States of America in its brief²⁰ is the principle that the four corners of an appeal are established by Appellant’s “specification of error.”²¹ As the brief of the United States of America reveals, this Court has repeatedly declared that there is an abandonment on appeal of those matters which are not contained in the specification of errors or in any way alluded to in the brief. That tenet of appellate practice is entirely ignored by Amicus and Appellant as they proceed far afield in their respective briefs presenting alleged issues which are not involved in this appeal. Appellant makes no mention in the Opening Brief of the “Repayment Contract,” a covenant heavily relied upon by the trial court in its findings of fact and conclusions of law.²² Repeated reference in the brief of the United States was made to the “Repayment Contract” and there stress was placed upon the importance of that document ignored by Ap-

¹⁹ Opening Brief of Appellant, page 4.

²⁰ Brief for the United States, Appellee, page 9.

²¹ Brief for the United States, Appellee, page 9.

²² R. 112, Findings of Fact Nos. 6 and 7; R. 114, 115, Conclusions of Law.

pellant.²³ Irrespective of the fact that Appellant chose not to reply to the brief of the United States in which the importance of the "Repayment Contract," statutes and laws relating to the San Carlos Federal Irrigation Project is alluded to, Appellant nevertheless seizes upon the brief of Amicus and makes reply to it. This wholly foreign question is raised by Appellant in the reply to Amicus: "Can it be successfully contended that the United States of America and San Carlos Irrigation & Drainage District can effectively enter into a contract abrogating the rights of Paul Brophy under the 'Landowners' Agreement'?"²⁴ That alleged issue presented in the quoted inquiry reveals the seriousness of the diversion from the principal issues here on appeal. Nowhere in Appellant's brief or in that of the United States of America will there be found a reference to such an inquiry. Moreover, that question is not relevant in any manner by reason of the fact that the court below made no ruling in regard to the question, made no reference to the existence of it and in no manner purported to consider it as it was not an issue in the litigation.

It is respectfully submitted that to consider the foreign issues presented by Amicus and Appellant would be plain and serious error, for as declared throughout, they are in no way relevant to the appeal

²³ Brief for the United States, Appellee, pages 6 et seq.

²⁴ Amicus Curiae Brief, page 23; Attempted response of Appellant in Answer to that of Amicus Curiae, page 4.

which is before this Court. Free from doubt are these facts:

Had Appellant considered valid issues contained in the above quoted question,²⁵ they would have been most assuredly presented on appeal, which they were not;

Had the trial court been called upon to resolve the issues thus created, it would have done so, but it did not.

To control an appeal or any part of it; to present issues which have not been joined by the principal parties litigant as is here attempted are not the functions of Amicus Curiae

Misconceiving the function of Amicus Curiae, the brief that it has filed, as emphasized above, presents issues which the principal parties litigant have not joined in this appeal. An attempt by Amicus Curiae to form these issues and the Appellant to answer them creates an anomaly not countenanced by the law. It has been authoritatively declared that "[Amicus Curiae] has no control over the suit * * * cannot assume the function of a party in an action * * *."²⁶ Moreover, an *amicus curiae*, as a "friend of the court" has no status except to advise the court "* * * they are not parties to, and they are not bound by, the decree. They are without standing here to appeal."²⁷

Consistent with the rules above cited as to the limitations upon the function of an *amicus curiae*, it has

²⁵ Brief of Appellant in Answer to that of Amicus Curiae, page 4.

²⁶ 2 Am. Jur., Amicus Curiae, Sec. 4, page 680.

²⁷ *Winter Haven v. Gillespie*, 84 F. 2d 285, 287 (C. A. 5, 1936); cert. denied 299 U. S. 606 (1936); rehearing denied 301 U. S. 714 (1936); 13 Cyc. Fed. Proc. 3d ed., 58.16.

been declared that "An amicus curiae can neither take upon himself the management of the cause as counsel" or otherwise participate in the issues as has been attempted by Amicus in this cause.²⁸

It is thus abundantly manifest in the light of the cited authorities that Amicus Curiae and Appellant may not formulate issues extraneous to the appeal.

CONCLUSION

This Honorable Court is respectfully requested to grant the motion to strike of the United States of America thus eliminating the issues which Amicus and Appellant seek to present in this cause but which are entirely foreign to the appeal.

UNITED STATES OF AMERICA,

15/j. Lee Rankin

J. LEE RANKIN,
Assistant Attorney General.

15/ William H. Veeder

WILLIAM H. VEEDER,
Attorney, Department of Justice.

Dated: *Jan 5th, 1936*

²⁸ *State v. McDonald*, 63 Ore. 467, 128 Pac. 835, 837 (1912).

No. 14721

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**ROSCOE WAGNER, D/B/A WAGNER TRANSPORTATION
COMPANY, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
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FILED

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PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.

ROSCOE WAGNER, D/B/A WAGNER TRANSPORTATION
COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against respondent on December 6, 1954, following the usual proceedings under Section 10 of the Act. The Board's decision and order (R. 13-43) ² are reported at 110 N. L. R. B. No. 192. This Court has jurisdiction of the proceeding under Sec-

¹ Relevant provisions of the Act appear in the Appendix to this brief, pp. 12-14, *infra*.

² References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tion 10 (e) of the Act, the unfair labor practices having occurred in Twin Falls, Idaho, within this judicial circuit.³

STATEMENT OF THE CASE

I. The Board's findings and conclusions

Briefly, the Board found that respondent violated Section 8 (a) (3) of the Act by discharging Employee Cecil Weyer because of his membership in the General Teamsters, Warehousemen and Helpers Union, Local No. 483, AFL, herein called the Union; and violated Section 8 (a) (1) by this and other conduct. Where the testimony was in conflict, the Board adopted the credibility findings of the Trial Examiner. The evidence upon which these findings are based is summarized below.

A. Interference, restraint, and coercion

Early in 1954, Clinton Funk, a truck driver in respondent's employ, obtained a number of application cards from the Union and attempted to induce his fellow employees to sign them (R. 16, 21; 77-78). Respondent promptly manifested determined opposition to the Union's organizational campaign. Respondent Roscoe Wagner, who manages the business, told Funk "that if the union ever did step in it would ruin him" (R. 21; 78-79).

³ Respondent operates a fleet of trucks to and through the States of Idaho, Oregon, Nevada, Washington, Utah, and California, under a certificate from the Interstate Commerce Commission. Respondent's gross revenue from such operations is about \$350,000 annually, of which about \$250,000 is derived from the transportation of commodities in interstate commerce. (R. 15; 7, 10). No jurisdictional issue is presented.

A few days later, on February 14, Roger Wagner, respondent's brother and assistant manager of the business, summoned Employee Richard Gear to his office and discharged him (R. 20; 87-88). In the course of the talk which accompanied the discharge, Wagner asked Gear if he "hadn't let [his] buddies talk [him] into something," and stated that he did not "think very much of" Gear for signing an application for union membership (R. 20; 88). When Gear replied that he had a right to sign it, Wagner said, "That is right, but you know we will never go union, they tried it once and we sold out" (R. 20; 88).⁴ Wagner then told Gear that "he had the list of all the drivers who had signed up, that he knew who they were," and added: "You don't see good men [naming two of respondent's drivers] going union, do you?" (R. 20, 36; 89, 96). Roger Wagner later admitted to one of the other employees that Gear had been discharged for union activity (R. 18, 25, 38; 62, see pp. 5-6, *infra*).⁵

A day or two later, Roger Wagner came up to Employee Fox, asked him if he "had been approached by the union as to this contract they were trying to draw up," and inquired how Fox "felt about the

⁴ According to Roscoe Wagner, respondent and the Union had bargained concerning a contract in 1951, but they failed to reach an agreement that would permit him to operate "sleeper" trucks, and thereafter he disposed of some of his equipment and curtailed his business (R. 16; 109-110, 113-114, 105-106, 107-108).

⁵ Since the complaint did not allege that Gear's discharge violated Section 8 (a) (3), the Board made no finding to that effect (R. 21). However, the Board found that respondent's statements in connection therewith violated Section 8 (a) (1). See p. 6, *infra*.

union" (R. 22; 85). Wagner then asked what Fox thought about "drawing up a contract just between the employer and employees" (R. 85). At about the same time, Roger Wagner asked Employees Jones and Sizemord "what the union boys wanted" (R. 26; 71). Jones replied that he did not know, to which Wagner responded, "You should know, you joined the union" (*id.*). Wagner then said, "You know, we don't have to go union. If I have to, I can sell out like I did before, we can just keep one or two trucks and run them ourselves" (*id.*)⁶

On February 28, respondent and the Union executed a consent election agreement (R. 17; 58). Just before the election, Roscoe Wagner asked Employee Funk, the leader in the union movement, what the employees thought was "wrong"; and again asserted "that if the union got in that their demands would be extremely high and that he couldn't meet them and that he would be forced to sell off all the equipment, and * * * put a lot of guys out of work" (R. 21, 25; 79-80). Wagner declared that the Union was "getting to be * * * like just a bunch of Communists," and that the local business agent "was strictly no good" and wanted to organize the employees "just to hold his own job" (R. 21; 80).

The election was held on March 4. The Union failed to receive a majority of the votes cast, but it filed objections and the Regional Director set the election aside (R. 21; 58-59).

⁶ Both Roscoe Wagner and Roger Wagner occasionally acted as truck drivers (R. 113-114).

B. The discriminatory discharge of Cecil Weyer; further interference, restraint, and coercion

Cecil Weyer, a truck driver in respondent's employ, had been a member of the Union for about 15 years prior to his discharge (R. 17; 66). Early in February, he signed a new union authorization card (R. 17; 60). On February 16, Roger Wagner interrupted a conversation among three of the drivers, including Weyer, asking them, "How are you and the union doing? * * * I hear you fellows are organized" (R. 17-18, 36-27; 61). Weyer replied that he knew nothing of it, and when Roger Wagner asked if he had not signed a union application blank, answered that it was unnecessary for him to do so as he had been a member for 15 years (R. 18, 24, 37; 61). At this point, Roscoe Wagner, who had overheard the exchange, profanely called Weyer a "liar," pulled a piece of paper out of his pocket, held it up, and said, "I can tell you right where you signed this application and the day and everything, all about it" (*id.*). He then approached Weyer with doubled fist and threatened to "beat [Weyer's] head off" (*id.*). Weyer attempted to mollify Wagner, but Wagner announced: "I don't want to talk to a Communist. * * * I don't want no union man around here. They are just nothing but a bunch of Communists" (R. 18, 24, 37; 61-62). Roscoe Wagner then told Weyer that he, Weyer, was "going to resign" (R. 18, 24, 37; 62). When Weyer asserted that he would not do so, Roscoe Wagner instructed Roger Wagner to "fix up [Weyer's] resignation papers" (*id.*).

6

Roger Wagner then prepared, and Roscoe Wagner signed, a statement that Weyer had "left of his own free will" and that "his services as a truck driver have been satisfactory" (R. 18; 13, 63). Roger gave the statement to Weyer, saying, "I hate to see this, you have been one of our best drivers. You know how Roscoe feels about the union. You know what happened to Dick Gear and Bob Sauers and some more of them" (R. 18, 23; 62). Roger added that "he wouldn't have a union man working for him and * * * he would sell every truck in the fleet if he had to" (R. 25; 63). As his conversation with Roscoe had been unpleasant and contained the suggestion of bodily harm, Weyer took the letter and left (R. 18, 24; 62, 64).

About April 30, respondent offered to reemploy Weyer, but Weyer refused the offer (R. 19; 65-66).

C. The Board's conclusions

The Board found (R. 36), in agreement with the Trial Examiner (R. 25-26), that respondent violated Section 8 (a) (1) of the Act by telling employees that Gear's discharge resulted from membership in the Union; threatening to sell all or part of his business if the Union organized the drivers; encouraging the employees to believe that their protected activities were under surveillance; and, in the context of this coercive conduct, interrogating the employees regard-

ing their union activities. The Board further found (R. 38-39) that respondent discharged Employee Weyer because of his union membership, in violation of Section 8 (a) (3) and (1).⁷

II. The Board's order

The Board's order (R. 39-41, 30-31) requires respondent to cease and desist from the unfair labor practices found, or from in any other manner interfering with his employees' statutory rights; to make Employee Weyer whole for any loss of pay he may have suffered by reason of the discrimination against him; and to post appropriate notices.

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained, and coerced his employees in the exercise of their organizational rights, in violation of Section 8 (a) (1) of the Act

The evidence summarized on pp. 2-6, *supra*, establishes that respondent (Roscoe Wagner) and his brother (Roger Wagner), who acted respectively as the Company's manager and assistant manager, told the employees that respondent might sell all or part of his business if the Union organized the employees, announced that Employee Gear was discharged be-

⁷ The Trial Examiner dismissed that part of the complaint alleging that respondent discharged Employee Weeks because of his union activity, on the ground that he was discharged for business reasons (R. 22). The Board affirmed this dismissal (R. 41).

cause of his union membership, led the employees to believe that their union activities were under surveillance, and, in the context of this coercive conduct, interrogated the employees concerning their union activity. There can be no doubt that respondent thus engaged in the kind of interference, restraint, and coercion proscribed by Section 8 (a) (1) of the Act. See, e. g., *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 904 (C. A. 9); *N. L. R. B. v. Howell Chevrolet Co.*, 204 F. 2d 79, 83 (C. A. 9), affirmed, 346 U. S. 482; *N. L. R. B. v. W. T. Grant Co.*, 199 F. 2d 711, 712-713 (C. A. 9), certiorari denied, 344 U. S. 928; *N. L. R. B. v. State Center Warehouse Co.*, 193 F. 2d 156, 157 (C. A. 9); *N. L. R. B. v. Anderson*, 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938; *R. R. Donnelley & Son v. N. L. R. B.*, 156 F. 2d 416, 419 (C. A. 7), certiorari denied 329 U. S. 810.

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discharged Employee Weyer because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act

The evidence summarized on pp. 2-6, *supra*, establishes that respondent Roscoe Wagner strongly opposed the Union's organizing drive; that when Weyer denied having signed a union authorization card, Roscoe angrily contradicted Weyer and told him that "you are going to resign" because "I don't want no union man around here;" and that after drawing up Weyer's termination slip, Roger Wagner told Weyer: "You know how Roscoe feels about the union, you

know what happened to Dick Gear and Bob Sauers and some more of them.” These circumstances fully support the Board’s finding that respondent discharged Weyer because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act. See *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 906 (C. A. 9); *N. L. R. B. v. Smith Victory Co.*, 190 F. 2d 56, 57 (C. A. 2); *N. L. R. B. v. Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840, 843 (C. A. 4).

In his exceptions to the Intermediate Report, respondent’s counsel contended, “Cecil Weyer was discharged for insubordination and because he called the Respondent a liar during an altercation with the Respondent, it further appearing from the record that the employee Cecil Weyer signed a written statement admitting that he had left the employ of the Respondent of his own free will and accord” (R. 32).^s Counsel further asserted (R. 33), “Respondent became dissatisfied with Weyer’s work when he learned that he had spent several hours on several different occasions visiting a certain motel in Nevada and that upon being accused of this act Weyer called the respondent a ‘damned liar.’ * * * the reason for the discharge was the insubordination on the part of Weyer and his inefficiency as a driver having shirked his responsibilities on several occasions.” The Board properly rejected these contentions (R. 36-38, 22-25).

^s Weyer’s termination slip (R. 13, 63) does not in fact bear his signature.

First, the fact that, in virtually the same breath, respondent advances the two inconsistent contentions that Weyer resigned and that he was discharged for cause casts considerable doubt on the validity of both. *N. L. R. B. v. Radcliffe*, 211 F. 2d 309, 314 (C. A. 9), certiorari denied, 348 U. S. 833. Second, according to the testimony of Roger Wagner, the motel stopovers included only one serious delay, and this was not one of the “actual reasons” for Weyer’s discharge (R. 18–19; 99). Third, the occasion for these stopovers had disappeared two months before the discharge, with Weyer’s marriage to the woman whom he had stopped to visit, and respondent had never complained to Weyer about them (R. 22–23; 65, 67). Finally, the Trial Examiner, who had an opportunity to observe the witnesses, credited Weyer’s denial that he had called Roscoe Wagner a liar, and discredited Roger and Roscoe Wagner’s testimony that he had done so (R. 23, 38). We submit that on this state of the record, the Board’s exercise of its power as a fact-finding body should not be disturbed. *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 906–907 (C. A. 9); *N. L. R. B. v. Anderson*, 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938.

CONCLUSION

It is respectfully submitted that the Board’s findings are supported by substantial evidence on the

record considered as a whole, and that a decree should issue enforcing the order in full.⁹

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National Labor Relations Board.

JUNE 1955.

⁹ In his answer to the petition for enforcement, respondent contended for the first time that "the Respondent consented to an election at or about the time of the alleged violations and that the election was conducted by the National Labor Relations Board as provided by law, and that had the Respondent been guilty of the allegations contained in the Complaint or the charge made by the union, the election would not have been held" (R. 49). Apparently respondent refers to the Board's practice of refusing to conduct a representation election in a bargaining unit regarding which unfair labor practice charges are pending, unless the unions on the ballot file written waivers of their right to use the matters alleged in such charges as a basis for setting aside the election. See *Wells Dairies Cooperative*, 109 NLRB No. 1450. Respondent's contention is without merit, since the charges in the instant case were not filed until after the election had been held (R. 1, 58-59). As noted *supra*, p. 4, the Union lost the election, but for reasons not revealed by the record the Regional Director set it aside (R. 21; 58-59). In any event, not having made this contention before the Board, respondent is precluded by Section 10 (e) of the Act from making it before this Court. *N. L. R. B. v. Seven-Up Bottling Co. of Miami*, 344 U. S. 344, 350; *N. L. R. B. v. Pinkerton's National Detective Agency, Inc.*, 202 F.2d 230, 233 (C. A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and pro-

ceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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IN THE
United States
Court of Appeals
For the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT **FILE**

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ELI A. WESTON,

Residence: Boise, Idaho **PAUL P. O'BRIEN**
Attorney for Respondent

IN THE
United States
Court of Appeals
For the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

The only question to be determined in this case is whether or not employee Cecil Weyer, a truck driver, is entitled to compensation by way of back pay for the short period between February 16, 1954, and April 30, 1954.

While the "remedy" suggested by the Board includes posting of notices in addition to the payment of back pay, the Respondent has no objection to the posting of the notices providing the notice does not contain the words "We will make Cecil Weyer whole for any loss of pay suffered as a result of the discrimination against him."

This case is an example of the desire on the part of the National Labor Relations Board to pursue all matters to the bitter end causing the employer as much expense and embarrassment as possible. With the Board, all cases must go to Court. The amount involved in this case would probably run between \$100.00 and 150.00 payment to a employee who is now working elsewhere and not interested in the case. The probable result of a Court Decision would be to disturb the present peaceful and harmonious relations between the employer and his employees, to renew old grievances and complaints and put the Respondent to additional expense.

The Petitioner endeavors to sustain its findings that the Respondent unlawfully discharged the employee Weyer by arguing that the Petitioner proved by a preponderance of the evidence the following alleged conduct by the Respondent:

(A) That the Respondent promptly manifested determined opposition to the Union's organizational campaign.

(B) That the Respondent alleged that if the union came in it would ruin him.

(C) That the company would never go union but would sell out first.

(D) That the employee Weyer was discharged for union membership.

A. THAT THE RESPONDENT PROMPTLY MANIFESTED DETERMINED OPPOSITION TO THE UNION'S ORGANIZATIONAL CAMPAIGN.

In referring to purported evidence to support its findings, Petitioner has repeatedly referred in the Record to the Trial Examiner's Intermediate Report and Findings and all references in Petitioner's Brief prior to page 41 of the Record are references of this kind and do not refer to the actual testimony of the witnesses in the case. Respondent does not feel that references to the Trial Examiner's Conclusions or inferences are to be considered by the Court as evidence if the inferences and conclusions are inconsistent with the statements by the witnesses themselves.

With reference to the Respondent's opposition to the union's organizational campaign, we call the Court's attention to the testimony by the organizer, himself, Cecil Jones, starting on page 52 of the Transcript and ending on page 59 which shows, contrary to the position by the Petitioner, that the Respondent voluntarily sought out the union organizer on February 16, 1954. Respondent told the organizer he wanted to discuss the union question and in the discussion the Respondent stated that he was paying all the wages that he could and that any

increase in wages or any sleeper-cab provisions of a contract similar to the one that was presented to the Respondent in 1951 would make it impossible for him to operate and that he would have to close or curtail his business as he had in 1951.

In the conversation between the Respondent and the organizer, the Respondent also stated that he would consent to an election and did consent to the same and the same was conducted. It is important to note that the Respondent agreed to sign a contract if it were a flexible contract, one under which the Respondent could operate and not suffer him to lose his business. (R 56).

At a second meeting in the evening of the same day when the organizer asked the Respondent to reinstate the employee Weyer, the Respondent stated that he would not reinstate him as the employee had called him a liar, and also that the employee Weyer had been killing too much time on his trips and that he had been drinking on the job and that he was laying up with some woman in Nevada. There is nothing in this conversation between the Respondent and the organizer to show any animosity to the union, but on the contrary it shows that the Respondent was willing to have a consent election and was willing to sign a contract providing the same was flexible, a contract under which he could operate, but that if it were such a contract as to be economically unworkable, the Respondent could not sign the same as it would drive him out of business.

In an Administrative Decision of the General Counsel, Case No. K-14, dated July 5, 1955, (CCH Paragraph 53,052) the General Counsel, in a case somewhat similar to this case, ruled that even though there might be some evidence that the discharge was discriminatory, where the employee, in a heated argument over the telephone with the superintendent, lost his temper, the General Counsel ruled that the employee could be discharged without penalty because of his tempermental outburst.

Section 10 (c) of the act provides, among other things, as follows:

“ . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .”

The Respondent in this case contends that even if there is some evidence of animosity to the union or discrimination against the employee, the fact that the employee engaged in a heated altercation with the employer and called him a liar, or other names of like character, this tempermental outburst disqualified the employee for future employment and justified the employee's discharge.

We fail to see how the Record sustains the Petitioner's position that the Respondent promptly manifested determined opposition to the union's organizational campaign.

B. THAT THE RESPONDENT ALLEGED THAT IF THE UNION CAME IN IT WOULD RUIN HIM.

The second point relied upon by the Petitioner to show discrimination, interference, restraint and coercion is the alleged statement by Roscoe Wagner that if the union ever stepped in it would ruin him. Here again we refer to the testimony of the organizer starting on page 52 wherein it appears that in the meetings between the Respondent and the union organizer the Respondent objected to the unworkable provisions of the proposed contract from Salt Lake City. The Respondent was willing to sign a contract, however he claimed that because of the distinct operating features of his business he could not sign the same kind of contract that had been presented and that it must be flexible. This position on the part of the Respondent is born out by his testimony beginning on page 108 of the Record whereas it appears that in the 1951 controversy the Respondent agreed to a contract in all respects except the so-called "sleeper cab contract". It appears from the testimony on pages 108 and 109 that the Respondent could not operate with the "sleeper cab contract" and so informed the union.

This testimony by both the organizer Jones and the Respondent Roscoe Wagner clearly shows that the Respondent was stating an actual fact in presenting an economic reason why he could not operate under the sleeper-type contract proposed by the union. Without the objectionable provisions the

company was willing to sign a contract with the union. Certainly the respondent has a right to state the economic reasons why he cannot operate and tell the union that if the contract is unworkable and prohibitive it would ruin him. After all, it is an expression of opinion on the part of the Respondent as to conditions under which he can or cannot operate his business. This also refers to the third reason relied upon by the Petitioner to show interference, restraint, coercion and discrimination in this case.

C. THAT THE COMPANY WOULD NEVER GO UNION BUT WOULD SELL OUT FIRST.

Here again we have practically the same thing relied upon by Petitioner under Point (B), and we again suggest that a review of the statements by both the labor organizer and Roscoe Wagner support the position that the statement "You know we will never go union . . . they tried it once and we sold out." refers to the fact that the company could not operate under the type of contract presented to the Respondent containing the objectionable "sleeper cab" provision. This statement does not show animosity or opposition to the union or a desire to interfere, restrain or coerce members of the union, but on the contrary it is a straight forward factually supported statement that the company could not operate under the proposed contract. The proposal was economically unsound and the union had tried to force this type of contract at a former time but was unsuccessful. All the way through this case

we find the Respondent willing to sign a contract that is workable and flexible. Respondent consented to an election to determine the question of bargaining for the contract but he definitely states he cannot and will not operate under a contract which will drive him out of business.

D. THAT THE EMPLOYEE WEYER WAS DISCHARGED FOR UNION MEMBERSHIP.

The Petitioner bases its entire case on what it alleges as bias or prejudice on the part of the employer towards the union. To support this contention they go back as far as 1951 and attempt to show by isolated statements that the employer had animosity or prejudice against the union. Respondent contends that this is completely overcome by the testimony of the organizer, himself, beginning on page 54 of the Transcript that the employer willingly offered to sign a contract providing the same was workable and flexible and within the limits of the company's economic possibilities. Testimony further shows that the employer agreed to a consent election which was conducted and in all ways cooperated with the organizer until the employer discovered that the contract presented was unconscionable and impossible of operation.

This brings us then to the real question in the case, was the employee Weyer discharged discriminatorily and for union sympathy?

Respondent refers again to Section 10 (c) of the Act and particularly to the following words in said Section:

“ . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .”

and again the Respondent repeats its position that if the facts in the case show that the employer had cause for the discharge and that if the cause was the prime reason, the discharge was not discriminatory and the employee would not be entitled to reinstatement.

In the case of Local No. 3, United Packinghouse Workers, CIO vs. NLRB, 210 F 2d 325, the Court stated that the burden of proof on unfair labor practice charges rests upon the Board and is at no time shifted to the employer.

“Burden of proof of unfair labor practice charges rests upon the Board and is at no time shifted to employer. Employer who, in defense to charges of discriminatory discharges and refusals of reinstatement, contends that employees furnished good cause for his action does not have burden of proving existence of good cause. Evidence tending to show causes other than union membership or activity is admissible and tends to disprove charge of discrimination. To sustain burden of proof, Board must introduce evidence sufficient to outweigh employer's defensive evidence.”

In the case of *Blue Flash Express*, (109 NLRB 85) the Board held that the General Counsel failed to sustain the burden of proof where the evidence sharply conflicted and the Trial Examiner resolved that conflict by discrediting the General Counsel's witnesses.

The general principle that the employer is not required to exonerate himself of unfair labor practice charges and that the burden of proof rests upon the Board to prove charges affirmatively and by substantial evidence is affirmed in the following cases:

"Employer is not required to exonerate himself of unfair labor practice charges. Burden of proof rests upon Board. Board must prove charges affirmatively and by substantial evidence." *NLRB vs. MacSmith Garment Co.* (203 F 2d 868); *NLRB vs. National Die Casting Co.*, (207 F 2d 344); *NLRB vs. Reynolds International Pen Co.* (162 F 2d 680).

In the Conference Report from the 1947 Act entitled *Correlation of Evidence Requirements of Amended Act*, the Conference Committee has this to say:

"Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence'. By reason of this language, the courts have, as one has put it, in effect, 'abdicated' to the Board." *NLRB vs. Standard Oil Company* (138 F 2d 885).

“In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact.” *NLRB vs. Hearst Publications, Inc.* (322 U. S. 111).

“As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board’s decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.”

CONCLUSION

In conclusion, Respondent respectfully submits that the evidence in this case does not support the contentions of the Petitioner that this Respondent held any animosity or ill feeling toward the union and further that the evidence in this case does not

support the finding that the employee Weyer was discriminatorily discharged.

Respectfully submitted,

ELI A. WESTON

Attorney for Respondent.

Dated: August, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs 151, et seq.) are as follows:

Sec. 10 (c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

* * *

No. 14722

United States
Court of Appeals
for the Ninth Circuit

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Appellant,

VS.

SOUTHERN PACIFIC COMPANY,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 20 1955

No. 14722

United States
Court of Appeals
for the Ninth Circuit

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
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Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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In the United States District Court
For the District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, Deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

PRE-TRIAL ORDER

The above case came on regularly for pretrial conference before the undersigned Judge of the above entitled Court at Eugene, Oregon, on Wednesday, April 7, 1954. Plaintiff appeared by Elmer Sahlstrom and Nels Peterson, of her attorneys, and defendant appeared by John Gordon Gearin, of its attorneys.

The parties with the approval of the Court agreed to the following

Statement of Facts

I.

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

On or about the 16th day of October, 1952, Eric

Gunner Eastman was employed by defendant and while in defendant's yards in the City of Eugene, Lane County, Oregon, he was struck on the head by the door of a dump car causing injuries from which he died.

III.

Plaintiff is the duly qualified, appointed and acting administratrix of the estate of Eric Gunner Eastman, deceased, and brings this action for the benefit of herself as surviving widow of said Eric Gunner Eastman, deceased, or as his surviving dependent widow.

Plaintiff's Contention

Plaintiff contends that the defendant is a corporation engaged in the operation of a railroad within the State of Oregon and elsewhere, and owns and operates certain yards, tracks and premises in connection with the operation of said railroad in and around the City of Eugene, Oregon, and was the owner and had control of a certain dump car on or about October 16, 1952, which dump car was defective in that the door on said dump car would not operate; that prior to October 16, 1952, said defendant had placed said dump car upon its track in Eugene, Oregon, for repair of the mechanism upon the said dump car; that while said car was upon said tracks for the purpose of being repaired, Eric Gunner Eastman, deceased, was struck on the head by the door of said dump car causing injuries from which he died; that said dump car was designed for and used by said defendant for the

maintenance of its road beds and tracks within the State of Oregon and elsewhere.

Plaintiff contends alternatively as follows:

A. That defendant on and prior to October 16, 1952, was a common carrier by railroad engaged in interstate commerce or at and prior to the time of receiving the injuries hereinafter referred to said deceased was employed by defendant and part of his duties was in furtherance of interstate commerce or his duties directly or closely and substantially affected such commerce, and the accident complained of arose while decedent and defendant were engaged in the conduct of interstate commerce and that defendant was negligent in one or more of the following particulars at said time and place:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. Failure to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide for decedent a safe place in which to work in that the defendant failed to provide an adequate guard about the area on the side toward which car was being dumped and the door being dropped and on which side fellow employees, including decedent, were standing, by means of a rope or other barricade.

5. In failing on the part of the defendant by its servants, agents and employees to ascertain that

all persons, including the decedent, were in the clear and out of the way of said dump car and drop door to be opened on the side of the car on which decedent was standing prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

7. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

8. In failing to inspect the dumping mechanism by a competent employee to ascertain the hazards attendant on the repair of said dump car.

9. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

"In case of serious injury call the nearest company surgeon. If one cannot be secured, call the

nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away."

10. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hospital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

B. That if decedent, Eric Gunner Eastman, at the moment of injury to him, was not engaged in interstate commerce and the defendant at such time was not engaged in the conduct of interstate commerce, then in that event, defendant corporation was in charge of, or responsible for, work involving risk or danger to its employees or the public, and that said defendant corporation was negligent in failing to use every device, care and precaution which it was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine or apparatus in one or more of the following particulars:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at

a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. Failure to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide a guard or barricade by rope or other method so as to have prevented persons, including decedent, from entering the area immediately adjacent to said dump car when the same was undergoing repair.

5. In failing to ascertain that all persons, including the decedent, were in the clear and out of the way of the dump car and drop door to be opened on the side of the car on which the decedent was standing, prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In failing to comply with the following provision of the Basic Safety Code for the State of Oregon, effective October 1, 1949, Section 3.10:

"Before proceeding with repair work on any apparatus, electrical, mechanical, or otherwise, the switch controlling the power, or the valve controlling the stock, or whatever the source shall be properly tagged out and, when practical, secured with a lock. Tags used for this purpose shall warn against starting of machines and shall bear the name of the person responsible for shutting down the apparatus, etc. All persons other than the one designated by the tag are prohibited from starting any such equipment or apparatus."

7. In failing to inspect said dump car by a com-

petent employee, or other person, at and prior to attempting to repair the same.

8. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

9. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

10. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

“In case of serious injury call the nearest company surgeon. If one cannot be secured, call the nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away.”

11. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hos-

pital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

C. That if decedent, Eric Gunner Eastman, at the time of injuries to him, was not engaged in interstate commerce and defendant corporation was not engaged in the conduct of interstate commerce, then in that event, defendant corporation at said time and place was an employer within the State of Oregon engaged in a hazardous occupation as defined by the Workmen's Compensation Law of the State of Oregon and was negligent in one or more of the following particulars:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. In failing to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide for decedent a safe place in which to work in that the defendant failed to provide an adequate guard about the area on the side toward which car was being dumped and the door being dropped and on which side fellow em-

ployees, including decedent, were standing, by means of a rope or other barricade.

5. In failing on the part of the defendant by its servants, agents and employees to ascertain that all persons, including the decedent, were in the clear and out of the way of said dump car and drop door to be opened on the side of the car on which decedent was standing prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

7. In failing to comply with the following provision of the Basic Safety Code for the State of Oregon, effective October 1, 1949, Section 3.10:

“Before proceeding with repair work on any apparatus, electrical, mechanical, or otherwise, the switch controlling the power, or the valve controlling the stock, or whatever the source shall be properly tagged out and, when practical, secured with a lock. Tags used for this purpose shall warn against starting of machines and shall bear the name of the person responsible for shutting down the apparatus, etc. All persons other than the one

designated by the tag are prohibited from starting any such equipment or apparatus."

8. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

9. In failing to inspect the dumping mechanism by a competent employee to ascertain the hazards attendant on the repair of said dump car.

10. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

"In case of serious injury call the nearest company surgeon. If one cannot be secured, call the nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away."

11. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hospital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull

fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

Plaintiff further contends that one or more of the aforesaid acts of negligence on the part of the defendant were the proximate cause of the injury and death of decedent; that this action is brought for the benefit of Teresa E. Eastman as the dependent widow of decedent and his sole dependent, or alternatively, individually as his surviving dependent widow, and she has been damaged by reason of the death of said Eric Gunner Eastman in the sum of \$75,000.00.

Plaintiff as the personal representative, further contends that she is entitled to recover the sum of \$10,000.00 for conscious pain and suffering of decedent between 9:00 a.m. and 10:40 p.m. of the day of his death.

Defendant denies the foregoing and specifically denies it was guilty of negligence in any particular charged or that any act or omission on its part constituted a proximate cause of conscious pain and suffering or the death of the decedent.

Defendant's Contentions

I.

Defendant contends that ordinarily Eric Gunner Eastman, the deceased, would have been working for the defendant in interstate commerce or in the furtherance thereof, but at the time of his fatal injury he had left the work to which he had been assigned and without any necessity or excuse there-

for was watching other workmen who were engaged in repair of a dump car.

II.

Defendant further contends that the Southern Pacific Company Hospital Department is a separate and distinct legal entity created solely by an award of the National Railway Labor Board and arbitration proceedings between the Southern Pacific Company and various railway labor organizations and said Hospital Department is governed by a board of thirteen members, seven of whom are Brotherhood representatives and six of whom are Company representatives and therefore Southern Pacific Company is not responsible for any alleged improper medical care or attention.

III.

Defendant contends the deceased was guilty of negligence constituting a proximate or contributing cause of his injury and death in that

(a) he voluntarily left work to which he had been assigned and stood by and in close proximity to a dump car which was being repaired when there was no justification or excuse for his so doing;

(b) he failed to pay heed to the instructions and warning given by other employees to stand in the clear of said dump car

(c) he suddenly and without warning left his place of safety alongside said dump car and walked forward directly alongside the said dump car when

he knew or in the exercise of reasonable care ought to have known that it was unsafe for him so to do.

* * * * *

Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the Court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Series of photographs.
2. Standard certificate of death.
3. Letters of Administration.
4. Motive Power and Car Departments Agreement between Southern Pacific Company and System Federation No. 114 Railway Employees Department American Federation of Labor Mechanical Section thereof.
5. Book on Southern Pacific Company Safety Rules.
6. Book on Safety Rules — Spokane, Portland and Seattle Railway Company.
7. Deposition of Jerome Delmas Lambert.
8. Deposition of Bruce McGregor.
9. Deposition of Austin E. Barker.
10. Deposition of Carl Myron Wood.
11. Deposition of Kenneth Earl Sutton.

12. Sealed exhibit for Impeachment purposes only.
13. 2 Railroad Passes—1949-1951, 1952-1954.
14. 2 Income Tax Returns for 1951 and 1952 (State).
15. Honorable Discharge from U. S. Army.
16. Basic Safety Code for the State of Oregon.
17. Defendant's Answer.

Defendant's Exhibits

1. Certified copy of award of National Railway Labor Board.
2. Photographs.
3. Map.
4. Plaintiff's adverse party deposition.
5. Deposition of Jerome Delmas Lambert.
6. Deposition of Bruce McGregor.
7. Deposition of Austin E. Barker.
8. Deposition of Carl Myron Wood.
9. Deposition of Kenneth Earl Sutton.
10. Sealed exhibit for impeachment purposes only.

Jury Trial

Timely request was made for trial by jury.

The parties hereto agree to the foregoing pretrial order and the Court being fully advised in the premises.

Now orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice, and it is further

Ordered that the pretrial order supersedes all pleadings, and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues between plaintiff and defendant as hereinabove stated shall be had.

Dated this 21st day of January, 1955.

/s/ GUS J. SOLOMON,

Approved:

/s/ NELS PETERSON,

Of Attorneys for Plaintiff

/s/ JOHN GORDON GEARIN,

Of Attorneys for Defendant

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to well and truly try the above entitled cause, do find our verdict in favor of the plaintiff, and against the defendant, and assess plaintiff's damages in the sum of \$10,000.00.

Dated this 25th day of January, 1955.

/s/ CARL BENSCHIEDT,

Foreman

[Endorsed]: Filed January 25, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

Comes now defendant and pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure moves the court for an order setting aside the verdict entered herein on January 25, 1955 in favor of plaintiff and against defendant in the sum of \$10,000.00 and entering judgment in favor of defendant and against plaintiff in accordance with the defendant's motion for directed verdict heretofore interposed herein and which motion was taken under advisement by the trial court.

Upon argument of this motion, defendant will contend that its motion, which was based upon the following grounds, to-wit: (1) there was no evidence that the defendant was guilty of negligence in any particular charged or (2) that any act or omission on the part of defendant constituted a proximate cause of the death of the deceased and (3) that the deceased was himself guilty of negligence constituting the sole proximate contributing cause of his death, was not granted, when under all the evidence there was as a matter of law no liability on the part of defendant.

/s/ KOERNER, YOUNG, McCOLLOCH
and DEZENDORF

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant

I, John Gordon Gearin, one of attorneys for defendant, hereby certify that the foregoing motion is made in good faith, not for the purpose of delay, and that the same is, in my opinion, well founded in law.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1955.

In the United States District Court
For the District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, Deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

ORDER

Defendant's motion for judgment notwithstanding the verdict under Rule 50B of the Federal Rules of Civil Procedure came on regularly to be heard before the undersigned Judge of the above entitled Court on Friday, February 4, 1955. Plaintiff appeared by E. B. Sahlstrom, and defendant appeared by John Gordon Gearin of its attorneys. The Court being of the opinion that the motion for directed verdict made by defendant at the close of

all the evidence in the case should have been granted for the reason that there was no evidence that the defendant was guilty of negligence in any particular charged by plaintiff, and the Court being fully advised,

Now orders that the verdict returned herein on January 25, 1955 in favor of plaintiff and against defendant in the sum of \$10,000.00 be and the same is hereby set aside and held for naught, and

It is further ordered that the defendant have judgment in its favor against the plaintiff.

Dated at Portland, Oregon, this 4th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Southern Pacific Company, a corporation, Defendant, and Koerner, Young, McColloch and Dezendorf and John Gearin, Its Attorneys:

You, and each of you, will please take notice that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order heretofore made and entered on the 4th day of February 1955, which said order set aside and held for naught the verdict of the jury for the

plaintiff and against the defendant herein, and granted judgment for the defendant in the above entitled action notwithstanding the verdict of the jury in favor of the plaintiff and against the said defendant, and the whole thereof.

Dated this 3rd day of March, 1955.

/s/ ELMER B. SAHLSTROM,

/s/ NELS PETERSON,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

ORDER

Based upon the records and files in this case and the Motion of the Plaintiff, appearing by and through her attorneys, It Is Hereby

Ordered and considered that the Clerk of this Court be and he is hereby directed to forward with the record on appeal the exhibits in this cause to the Clerk of the United States Court of Appeals, 9th Circuit, at San Francisco, California.

Dated at Portland, Oregon, this 11th day of March, 1955.

/s/ GUS J. SOLOMON,

United States District Judge

[Endorsed]: Filed March 11, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-trial order; Verdict; Judgment order dated February 4, 1955; Notice of Appeal; Undertaking for costs on appeal; **Order to forward exhibits to Court of Appeals; Designation of record; Designation of record (2nd); and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6787, in which Teresa E. Eastman, Administratrix of the Estate of Eric Gunner Eastman, Deceased, or individually as his surviving widow is the plaintiff and appellant and Southern Pacific Company is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.**

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

I further certify that there is enclosed herewith duplicate transcript of proceedings, **January 21, 1955** filed in this office in this cause, together with

exhibits 1-A to I, inclusive; 2-A to E, inclusive; 3 and 4.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of April, 1955.

[Seal] F. L. Buck, Acting Clerk
/s/ By THORA LUND, Deputy

In the United States District Court
District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, Jan. 21, 1955, 10:00 o'clock a.m.

Before: Honorable Gus J. Solomon, District
Judge, with a Jury.

Appearances: Messrs. Elmer B. Sahlstrom and
Nels Peterson, Attorneys for plaintiff; Mr. J. Gor-
don Gearin, of Attorneys for defendant. Court Re-
porter: Gordon R. Griffiths. [1*]

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

Morning Session

The Court: Are the parties ready in the case of Eastman versus Southern Pacific Company?

Mr. Sahlstrom: Plaintiff is ready, your Honor.

Mr. Gearin: Defendant is ready, your Honor.

The Court: Call the Jury.

(Jury empaneled and sworn.)

(Opening statements by counsel.)

The Court: Mr. Sahlstrom, call your first witness.

Mr. Sahlstrom: Plaintiff will call Mr. Lambert to the stand as an adverse party.

Mr. Gearin: Mr. Lambert is not the managing agent. He is not an adverse party under the rules.

The Court: There is a presumption that every witness testifies to the truth unless he has been shown to be contradicted because of his position. We will determine whether a witness is an adverse witness by the way he testifies. If he testifies adversely, we shall permit leading questions. [2]

JEROME LAMBERT

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. Will you state your full name, please?

A. Jerome Lambert.

Q. Where do you live, Mr. Lambert?

A. I live in El Cerrito, California.

(Testimony of Jerome Lambert.)

Q. By whom are you employed at the present time? A. Southern Pacific Company.

Q. At the present time what is your capacity, job?

A. I am a foreman for the Southern Pacific.

Q. How long have you been at El Centro?

A. It is El Cerrito.

Q. El Cerrito, excuse me.

A. I have been there since October, I believe it is.

Q. Of 1954? A. '54.

Q. Prior to that time where had you been stationed?

A. I have been stationed at Klamath Falls, Oregon, and at Eugene.

Q. For how long have you been employed by the Southern Pacific Company? A. Since 1929.

Q. On or about October 16, 1952, the day of the accident, were you employed by Southern Pacific Company? A. I was.

Q. In what capacity?

A. I was a lead workman.

Q. What is a lead workman?

A. He is assigned to work with, direct, and lead small groups of workers.

Q. At that particular time who was the foreman?

A. Mr. Carl Wood was our direct foreman.

Q. Were you employed in the Southern Pacific Company's repair yards at Eugene on that date?

A. I was.

(Testimony of Jerome Lambert.)

Q. Where are the repair yards?

A. They are located outside the city limits of Eugene perhaps, well, right close to the city limits.

Q. What kind of work is done there?

A. They repair freight cars and adjust loads, various other types of work in connection with freight car repairs.

Q. At that particular time in that yard were all types of cars, of freight cars, then being worked upon?

A. There were a good many, yes.

Q. Would those cars be cars that would come from other states and go into other states?

A. They would. [4]

Q. On October 16 of 1952 were you acquainted with Eric Gunner Eastman? A. I was.

Q. At that particular time for how long had you known Mr. Eastman?

A. I had known him for perhaps twenty years.

Q. How long had he worked there in the repair yards at Eugene, to your knowledge?

A. He had had considerable time in the yards, but he had been interrupted by, for a period of time so that—I can't say exactly, but I know that it would be something like eight or ten years at least.

Q. To your knowledge, when was he first employed by Southern Pacific Company at the Eugene yards? A. I don't really know.

Q. You do not really know.

(Testimony of Jerome Lambert.)

On October 16, 1952, what particular classification was Mr. Eastman in?

A. He was a carman, and——

Q. And as a carman——

Mr. Gearin: Just let him finish, please, Mr. Sahlstrom.

Q. And as a carman are there different classifications?

Mr. Gearin: I object. The witness has not finished his answer, your Honor.

The Court: What else did you want to say? He was a carman and what? [5]

The Witness: And was, it wasn't the particular duty as to operating the mill or a mill machine, or a carpenter he might be called.

Q. (By Mr. Sahlstrom): A mill man is a carpenter, is that correct? A. That is right.

Q. And as a carman are there different classifications of carmen which includes a mill man?

A. There is. It involves a different rate of pay.

Q. What are the main classifications?

A. There are—the larger group are car repairmen who are generally assigned to do general repair work on freight cars in this particular yard. Mr. Eastman had the classification of mill man, and it carried a slightly higher rate of pay.

Q. Was that due to his seniority?

A. To a large degree, yes.

Q. What I meant was, Mr. Lambert, are there other classifications of carmen which would in-

(Testimony of Jerome Lambert.)

clude mill men, upholsterers and inspectors and so forth?

A. Yes, they have passenger carman, for example, and they are all carmen and can be assigned to any work within their classification.

Q. So if I understand you correctly, then, in order to be a mill man you must be a carman, is that correct? [6]

A. That is correct.

Q. Did you see Mr. Eastman on the day of the accident? A. I did.

Q. Approximately what time did you first see Mr. Eastman?

A. On the day of the accident perhaps I saw him at the start of the shift, at 7:30.

Q. Is that the time that he would commence his duties there?

A. That is the starting time; yes, sir.

Q. What was the bulletin time at that particular time, do you know?

A. They started work at 7:30 a.m.

Q. 7:30; all right. Where was Mr. Eastman when you first saw him on that particular day?

A. Probably at his place of work in the mill room.

Q. In the mill, and what kind of tools and equipment was he required to work with?

A. He used carpenter tools generally speaking, which includes, of course, saws, hammers, but he also operated the mill machinery in this mill room

(Testimony of Jerome Lambert.)

which included a cutoff saw, band saw, and planer.

Q. Is that all power-driven machinery?

A. Yes, sir.

Q. What was that machinery used for by Mr. Eastman?

A. It is used exclusively for the work connected with freight cars. [7]

Q. Can you describe just briefly that general type of work?

A. Yes, the floors of flatcars and boxcars required planks for decking. It is used for cutting off correct sizes of flooring or for any other wood-work in connection with the freight cars.

Q. So, as I understand you, Mr. Lambert, then his duties would include working on cars out in the repair yard, doing the general carpenter work on those cars? A. That is right.

Q. Are there various tracks there at this repair yard? A. Yes, sir.

Q. Where is Track No. 15 in relation to the buildings there at Eugene?

A. Track No. 15 is one of two tracks located north of the car repair shed.

Q. What are those tracks used for?

A. They are used for, particularly for running repair work, or any work so assigned by the car foreman.

Q. Approximately just what is the length of the car tracks that are in use?

A. Would you mean in the number of feet?

(Testimony of Jerome Lambert.)

Q. Yes, approximately, if you can give that to us.

A. Well, I would not be able to answer that exactly because any answer I would give might be misleading, but—— [8]

Q. Just give us your best judgment.

A. It would probably hold 30 cars, perhaps, well, each one 40 feet long. That would be just an estimate.

Q. Is a good portion of that area of those tracks covered?

A. Not the two tracks that were in question; no, not the track in question either.

Q. Well, one of the tracks is covered, then; is that right?

A. There are two tracks covered, and the two that—one of these two tracks that you are speaking of is outside of the shed, not covered.

Q. At this particular location of this accident was that beyond the covered area?

A. Yes, it was.

Q. Was it on Track No. 15?

A. That is right.

Q. To your knowledge, were there two cars there that were being worked on, a flanger car and a dump car? A. Yes, it was.

Mr. Sahlstrom: May it please the Court, in the deposition of Mr. Lambert there were several photographs that were referred to. We would like to have them at this time.

(Photographs referred to produced.)

(Testimony of Jerome Lambert.)

Mr. Sahlstrom: There is also one in MacGregor's deposition.

(Photographs produced.) [9]

Mr. Sahlstrom: I would like to have these photographs handed to the witness, your Honor, and identified, if I may.

Mr. Gearin: The identity has been waived, your Honor.

The Court: Any objection to the admission?

Mr. Gearin: No, I do not have any objection to any of the photographs that plaintiff has that have been exhibited to me before.

The Court: All right, you have numbered them 1, a series of photographs. We will number them 1-A, -B and so on.

(Photographs marked Plaintiff's Exhibits 1-A through 1-I, inclusive.)

Q. (By Mr. Sahlstrom): Will you describe for the jury, Mr. Lambert, what a flanger car is, briefly?

A. A flanger car that was referred to is a car that is used for removing snow, primarily, from between the rails after it has been plowed off. It has a body, enclosed body on the trucks, used for the crew to ride in. This body includes the operating mechanism for raising the blades of this flanger, and it also has in it a seating arrangement for the operator, for operators. It has small bay windows on either side for the crew to enable the crew to observe the right-of-way when it is being

(Testimony of Jerome Lambert.)

pulled along the track by the locomotive. It has a stove in for heat. Does that cover it enough?

Q. Yes. Now, I have handed you a series of photographs, Plaintiff's Exhibits 1, and they are marked A, B, C, consecutively. [10] Do those photographs fairly represent a picture of the flanger and the dump car?

A. Yes, there is a photograph of a flanger car here (indicating).

Q. And of the dump car?

A. And of the dump car.

Q. Do those photographs fairly represent the condition of the dump car and the flanger car as it was on the day of the accident?

A. Yes, they do, with one exception. These photographs indicate that the dump car was coupled to the flanger car, which at the time was not the condition. They were separated.

Q. To your best recollection, how far were they separated from each other?

A. I would be unable to say exactly, but a short distance, oh, a matter—well, far enough apart so as to enable the workmen to pass between them.

Q. Would you say two or three feet?

A. Approximately; yes, sir.

Q. At this time, your Honor, may we have the Bailiff hand the photographs to the jury for examination. We offer them in evidence, first, your Honor.

The Court: Yes, they are admitted; but it is a quarter of 12:00 now. Are you finished with your

(Testimony of Jerome Lambert.)

questions? Are you finished with this witness? [11]

Mr. Sahlstrom: No, I am not, your Honor. This will be quite lengthy.

(Discussion off the record.)

Mr. Sahlstrom: I think probably, your Honor, the jury would probably follow the testimony better if they were to see the photographs first.

The Court: All right; we will let the jury look at the pictures right now.

Q. (By Mr. Sahlstrom): Mr. Lambert, I want to hand you Exhibit No. 1-A in evidence and ask you if that is a photograph of a dump car?

A. That would be difficult to say exactly without knowing the number.

Q. Yes, I will hand you B and ask if that number illustrates a view of the dump car involved in this case?

A. That is the number of the car; yes, sir.

Q. Can you illustrate, from Plaintiff's 1-B, which is the flanger car and which is the dump car? Hold it up so that they can see it, if you will, please.

A. The flanger car is the one with the enclosed body. The dump car is the one to the right with the number MW3372 with the mechanism below it.

Q. Referring to 1-F, does that show the steps coming down from the end of the flanger car?

A. Yes, that does show the steps. This is the flanger car, and this is the—— [12]

Q. Would that be a means of getting into and out of the flanger car, up and down those steps?

(Testimony of Jerome Lambert.)

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 1-B and ask you to point out to the jury the dumping arms of the dump car.

A. The dumping arms that he refers to are this part of the mechanism here (indicating). However, I would not say that the dumping arm is the correct appellation for such, for that part of the mechanism, because——

Q. Describe it in your best terms.

A. Well, because that portion of it operates the locking device on the side door.

Q. Which portion operates the locking device? Point to it specifically and so that the jury can all see.

A. This rod running through here connected with this movable arm right in through there (indicating).

Q. How many of those movable arms are on each side of the car?

A. I believe there are four.

Q. I hand you again Plaintiff's Exhibit 1-G and ask what the photograph illustrates.

A. That illustrates fairly well the locking device. There are a number of them on the same car.

This rod running through here, which is square, connects the four different lever arms that operate the locking device and probably some other mechanism.

Q. You have referred to "locking device." I

(Testimony of Jerome Lambert.)

hand you Plaintiff's Exhibit 1-A. Will you point out to the jury where that locking device is?

A. This illustration of this part of the car shows the upper part of the car body, and the locking device is underneath the car—oh, there is an end lock that does hold the dump door. Now, the door that he refers to so frequently is located along the side of the car. This is an end view, and it is a corner, and the door is on the side, and there is also an auxiliary lock that holds the door tight to keep gravel or any parts of it from spilling out.

Q. Point out that exact lock that holds the door in that position. Point out to the jury; put your finger on it.

A. Well, of course, it is not visible there if there is one. Maybe that one is missing, but, of course, I can't see it anyhow.

Q. As a matter of fact, there was one lock missing, wasn't there? A. Yes.

Q. It had been burned off; is that correct?

A. That is correct, excepting that it is only one of several locking devices on it; yes, sir.

Q. Now, pointing to the exhibit again, how many of the [14] individual locks are there on each side of the door?

A. Besides the ones that are underneath the car and are connected with the lever arm, there is also a locking device that he is referring to here that in some way clamp over the end of this side door. There is a hook arrangement. In addition to that—

(Testimony of Jerome Lambert.)

A. Are there two on each end? That is what I am trying to bring out.

A. One on each corner.

Q. One on each corner? A. That is right.

Q. On each side of the dump car door. Now I hand you 1-C. Does that illustrate the door of that dump car?

A. It illustrates a portion of it fairly well. It is this portion from about here which is the bottom of the car body, and the top of it can be just seen in the corner of the picture, from there to there (indicating).

Q. I hand you Plaintiff's -I, I believe it is, 1-I. Point out the various parts of the mechanism there to the jury.

A. There, to begin with, is the first unlocking device, is this handle arrangement that can barely be seen underneath the car, which has to be arranged properly in the first action before dumping the car.

This handle is accessible from both sides of the car underneath it, and it depends on which way the car is to be [15] tipped that this handle is arranged, so the first thing to be done is to arrange this handle properly which allows it to tip only in one direction.

Q. In order to dump that car to the south, which way would that handle have to be placed?

A. Well, I would not know from the way the picture is. I would not know now which way that handle was to be placed, but it is either pulled and

(Testimony of Jerome Lambert.)

turned one way or the other, which is obvious when you can see it. I mean, you can see the actual mechanism. There is various pipes that operate the dumping device. These pipes through here are connected with the air mechanism. This hose here, for example, runs down to a portion of it and seats this, and this, of course, is another one of the lock lever arms. Perhaps my description is not completely lucid, but it is—that is the purpose of that mechanism anyway, and it is perhaps very difficult to see, but this is the rod, a square rod that operates the lock. It is a hook device underneath the car and is operated by air. It is not done manually at all.

Q. Mr. Lambert, in order to dump this dump car what is the first step to be taken in that operation?

A. There are a number of operations that will have to be—this is the car involved on the left. This is a different type.

Mr. Gearin: May I interrupt, your Honor, to ask a preliminary [16] question of Mr. Sahlstrom.

Do you mean to dump the car or to lower the door?

Mr. Sahlstrom: Well, I will come to that, but I believe, your Honor, it is all one operation; is that not correct, Mr. Lambert?

The Court: Are we getting into the main claim now?

Mr. Sahlstrom: No, we are getting onto the point illustrating how this car would dump, the procedure for dumping this particular car.

(Testimony of Jerome Lambert.)

The Court: Have you gone through all the other photographs?

Mr. Sahlstrom: Mr. Gearin has one photograph I would like to get at this time, your Honor.

The Court: Do you want to offer it?

Mr. Sahlstrom: We would like to offer the photographs only, your Honor, without the language that Southern Pacific Company has added to these particular documents.

The Court: We will do that after recess. This is a good time to take a recess.

Ladies and Gentlemen, we are going to recess, and you are excused until 1:30 this afternoon.

(Noon recess taken.) [17]

Afternoon Session

1:30 p.m., January 21, 1955, trial resumed as follows:

JEROME LAMBERT

recalled, testified as follows:

Direct Examination—(Continued)

By Mr. Sahlstrom:

The Court: Have those pictures been marked now? Mr. Sahlstrom, do you want to ask about the other pictures?

Mr. Sahlstrom: Yes, I do, your Honor.

Q. Mr. Lambert, we have marked Exhibit 2-A. Will you tell the jury what that photograph represents, please?

A. This photograph is a complete side view of the car in question, MW 3372.

(Testimony of Jerome Lambert.)

Q. Handing you Exhibit 2-D.

A. This picture represents the end view of the same car showing the operating—part of the operating mechanism and the control.

Q. When you point to the controls, what are those controls; what do they control?

A. They are air valves operating part of the dumping mechanism, and also there is a cylinder somewhat smaller than this underneath the car that operates the locking device referred to before.

Q. The particular cylinder that you have pointed to, what [18] does that cylinder do?

A. That cylinder is arranged so that it tilts the car after the side door has been opened.

Q. That is the only purpose, then, is to open—is to rock the car over? A. Yes, sir.

Q. It is not to open the door?

A. That is right.

Q. And then Exhibit 2-E, Mr. Lambert, what does that represent?

Mr. Gearin: Just a moment, Mr. Lambert. Before you show that to the jury, we would object to that, your Honor, because it shows the car in a tilted position. There is no testimony in this case and no charge raised that the car itself ever tipped, and so it would be entirely immaterial.

Mr. Sahlstrom: These are their photographs, your Honor, I am only offering their photographs.

Mr. Gearin: I have photographs of everything. I loaned them to Mr. Sahlstrom.

The Court: Objection sustained.

(Testimony of Jerome Lambert.)

Q. (By Mr. Sahlstrom): Just tell the jury, then, what happens when the car is dumped insofar as location of the apron of that car is concerned.

Mr. Gearin: That is objected to, your Honor. There is no charge that the car itself was dumped.

The Court: Is that correct, Mr. Sahlstrom; there is no such charge?

Mr. Sahlstrom: It is our position, your Honor, that the dumping operation——

The Court: Answer the question.

Mr. Sahlstrom: Yes, your Honor.

The Court: There is no charge?

Mr. Sahlstrom: No, it is not correct.

The Court: All right, I do not understand what you are talking about.

Mr. Sahlstrom: That is not correct. The dumping operation is all one continuous operation. It is our charge that the first part of the dumping operation was the dropping of the door.

The Court: What specification? Show it to me.

Mr. Sahlstrom: Yes; No. 4, your Honor; No. 6.

The Court: 4?

Mr. Sahlstrom: 4 and 6 of the pre-trial draft, and in 2, your Honor. In manipulating the dumping mechanism——

The Court: Read the question.

(Pending question read.)

The Court: You mean what happens when you invoke the dumping mechanism?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Jerome Lambert.)

The Court: I do not see anything wrong with that. The objection is overruled. [20]

The Witness: If I understand you correctly, then you want to know the precise——

Q. (By Mr. Sahlstrom): Now, what happens to the apron when the dumping mechanism is manipulated, the apron—or “door,” I think is the proper way to refer to it.

A. The first operation that takes place is the side door drops down horizontally or parallel with the floor of the car.

Q. And then what happens? What is the next phase of the operation?

A. The next phase is the car tilts, the car body tilts on a fulcrum through the center of the car lengthways.

Q. So that the door, then, becomes an apron next to the ground; the gravel flows all over this apron; is that correct?

A. That is correct. The door is a part of the, on the same level of the floor of the car.

Q. When the door is opened, the door does not drop all the way down the side of the car, does it?

A. It drops to a position level with the floor of the car.

Q. Level with the floor of the car?

A. Yes.

Q. Handing you Exhibit 2-C, what does that illustrate?

A. This picture is similar to the one that was shown before [21] showing the operating mechan-

(Testimony of Jerome Lambert.)

ism under the car which operates, again, the locks under the car, and the hinge where, this arm is hinged at that point in there and also just in the picture, and it is hinged again below.

Q. Now, I want you to go through a step-by-step illustration to the jury of what steps are necessary to make this car door open and perform a complete dumping operation.

Mr. Gearin: May it be understood, your Honor, that my objection goes to the dumping operation because, as I understand it, there is no testimony that the dump car did not turn, turn over, just the door came down, and if I am wrong in that assumption I wish Mr. Sahlstrom would tell me about it.

Q. (By Mr. Sahlstrom): The operation was never completed, was it, Mr. Lambert?

A. Not at that time; no, sir.

Q. Not at that time.

The Court: Do you want to find out from this witness how a dump car normally operates through the whole cycle?

Mr. Sahlstrom: Yes, sir; that is right.

The Court: Go ahead.

The Witness: May I use the picture to illustrate?

Mr. Sahlstrom: Yes.

A. This end view of this car could probably be the best illustration of the process that he refers to.

In normal traveling operation or when a car is not in use there is first of all this cylinder and piston arrangement that you see here, if it can be

(Testimony of Jerome Lambert.)

seen, is pivoted on a pin right in the center of the car, and when—before the—when it is in normal traveling operation, this end of this piston is secured to the side of the car with a pin in such a manner as to hold that side up. The apron on the other side or the side of the car is held in place by this rod that runs across there and is hooked over a slot opposite from the way this piston is attached in such a manner that it holds these doors tight against the car to make a double safety device for to prevent its coming down in transit.

However, the first thing you must do then is to disconnect that. Now, I might say right here that this rod running through with this hook over it is so arranged—there is a pinion at that point there, and when this one is hooked this one automatically comes up because the rod is only just so long and there is no flexibility in it, so when one is hooked the other is unhooked so that in this case the first thing to do would be to decide, of course, which way you are going to want the car tilted or dumped, and there is a similar arrangement on the opposite end of this car. That is another cylinder and piston, another rod through there, so there pistons obviously must be placed in the same position. In normal traveling operation they are fastened opposite each other to [23] make the locking device. So then one of them has to be turned or pivoted, and, like I say, the pivot is there which requires them to be turned around and locked on the side of the car that you wish dumped. Then, of course, this rod

(Testimony of Jerome Lambert.)

through here that holds the side up tight must be both arranged so that they are unlocked. Underneath that car perhaps the next operation would be to see that this lock, this device, is placed in proper working condition, operating position. That is pulled and turned in such manner that it will dip in the direction desired.

The next operation perhaps would be to connect this car—they are equipped with hoses on the end. Now, a part of those are a hose connected to the air brakes of the car which are separate and distinct from the air that operates the dumping device, so the proper hose must be connected to a source of the air pressure. In operation out on the line that would be a locomotive which would supply the air. Where it is standing around then it must get its air supply from another source. In the case in question it was from a pipe line running beside the rails of this track. It can just be seen in this picture, I believe. I believe that there is a pipe right close to the track.

Before the air is turned on it would be wise to take the precaution to see that the valves which are contained in this hollowed-out spot in the end of the car, see that those [24] valves are in proper position so that a supply of air will be—will go into the reservoir of the car. This reservoir is contained in the body of the car in between the center sills underneath the body, a long narrow cylinder, and when that is completely charged, that is, when the air pressure has reached a great enough amount

(Testimony of Jerome Lambert.)

to operate the mechanism, then the operator, the operator would then manipulate the valves on the end of the car when everything was in readiness and by opening the valves in one position, in a certain position I will say, the first thing that happens is, through a series of mechanical actions, this arm begins to operate, and while you cannot see it very good and I am not exactly sure just which one of those are the hook or locks, but I believe it is this part of it right there around this square rod—that turns down in such a manner that the hook is released. That at the same time allows this side door then to be free to drop, and it will drop down level with the floor of the car. It is not forced down; it merely drops by its own force, by gravity.

Mr. Sahlstrom: At this time we will offer in evidence the photographs marked 2-A and 2-C. your Honor.

The Court: Which one did I refuse to admit?

Mr. Gearin: I will withdraw my objection to it, your Honor, so they can all be in.

The Court: All right; they will be admitted. [25]

(Photographs previously marked for identification as Defendant's Exhibits 2-A through 2-E, inclusive, were received in evidence.)

Q. (By Mr. Sahlstrom): Mr. Lambert, is that car referred to and known as a Clark type of dump car?

A. It is.

Q. In your experience as a carman have you worked upon this Clark type of car before the day of the accident?

A. No, I have not.

(Testimony of Jerome Lambert.)

Q. That was your first occasion?

A. Yes, sir.

Q. As a matter of fact, is this an unusual car insofar as this particular yard is concerned?

Mr. Gearin: Immaterial, your Honor. There is no charge we had an unusual type of car.

The Court: What are you claiming for this?

Mr. Sahlstrom: I am claiming, your Honor, that *this* particular car was being worked upon by men that did not have experience with this particular type of car.

The Court: What specification is that?

Mr. Sahlstrom: No. 3 and No. 8, your Honor. In this particular type of car we claim it is a very unusual type of dump car, has very unusual mechanism, and there was no warning given of this——

The Court: Objection sustained. You cannot ask that question. [26]

Q. (By Mr. Sahlstrom): As I understand your testimony, then, there are two different locks that maintain this door in an upright position; is that correct?

A. There are actually, perhaps you could call it three: yes.

Q. Give us their locations, please.

A. The one locking device, of course, is the one referred to frequently as the hook under the car that is operated by these arms. The second locking device that I have reference to is the fact that the side of the car on each end is fastened in opposite direction to the cylinders and pistons of this dump-

(Testimony of Jerome Lambert.)

ing device. The third one, of course, would be this hook arrangement that is placed at the top edge of the door in transit to keep the door snug, which is exactly opposite to those which are secured by the piston arrangement.

Q. There are two locks on the south side of this particular car on the door; is that correct?

A. You are referring to the hook on the rod?

Q. Yes.

A. There are two, but they do not lock on both sides of the car at once. When they are hooked on one side of the car, they are unhooked from the opposite side. They cannot hook all four sides at the same time. They are so arranged that they must—they will only hook over one side of the car at the same time, at one time. They cannot hook both sides with the same rod. [27]

Q. On the south side there were two such hooks with this particular car?

A. There are two hooks; yes, sir.

Q. Is it not a fact that one of those hooks was burned off on this particular car?

A. That is right.

Q. So, as a matter of fact, there was just one hook, wasn't there? A. That is right.

Q. Is it not a fact that in order for this door to open and this dumping operation to commence that you would have to have air hooked up to the car?

A. Yes, sir.

Q. Isn't it also a fact that in order for the door

(Testimony of Jerome Lambert.)

to drop down that there would have to be some air in the car to cause it to start to drop?

A. I believe that is the case; yes, sir.

Q. And are some of those arms, the four arms underneath the car that you have referred to that caused that door together with the air to move so as to drop down?

A. The arm activates the locking device under the car, yes.

Q. And the door itself, then, would not drop down without the arms underneath being operated and there being air in the car? [28]

A. Yes, sir.

Q. On this particular car had there been a bad-order card attached to the car the day of the accident or prior thereto?

A. Yes, there was prior to.

Q. What is the purpose of attaching a bad-order card to this particular car?

A. A bad-order card indicates that an inspection had been made by car inspectors, usually in the train yard, indicating that there is some defect to the car and to instruct the switchman to move the car to the repair tracks where the defect can be corrected.

Q. What was the indication upon the bad-order card on this particular car?

A. I don't recall exactly the wording, but as nearly as I can recall it said, "Bad-order dumps" or "B.O. dumps," which just merely means that in some manner the dumping device was inoperative.

(Testimony of Jerome Lambert.)

Q. Who were the two men that had been working on this car prior to your arrival there to give assistance?

A. The men that you refer to no doubt are Carmen MacGregor and Barker.

Q. Are they both here in court today?

A. They are.

Q. How did it come to your attention that your assistance was needed on this particular operation?

A. They had been assigned to work on this particular car and had made several attempts to find out——

Q. Now, excuse me; just speak from your own knowledge. What was it that caused you to come to give assistance on this particular car?

A. I might say that my association with the men was, on this particular job, started at the beginning of their work on it.

Q. Well, to be specific, did you take them over there to show them what should be done?

A. I may not have taken them over to it as you refer, but I did tell them what we wanted to be done on that car; that they were assigned to work on it and that——

Q. Where were those instructions given?

A. Well, specifically I would not remember, but, of course, it would be somewhere on the repair tracks.

Q. Getting back to the original question, how was it called to your attention that your help was needed on this operation?

(Testimony of Jerome Lambert.)

A. After they had made attempts to find out the cause of——

Q. No, excuse me. Just who came and got you to come over to this job, or how did you happen to know about it?

A. Well, one of the men—I don't recall which one—came down and got hold of me and said that they would like to have me look at it.

Q. I see. Now tell us what you did when you went back over there. [30]

A. When I had an opportunity to get to the car, I walked around it with the intention of discovering what, if anything—any defective condition that I could observe that would cause the car to be inoperative.

Q. What was your understanding as to why the car was inoperative at that time?

A. I had no preconceived ideas.

Q. Then it was a matter of first impression with you to go there and look at the car yourself to determine the defect? A. Yes.

Q. What did you do to locate that hidden defect?

A. To question them as to what operation that they had gone through and made several tentative efforts to find the cause by just observation.

Q. And exactly what did you do?

A. I found what I thought might be the cause of the car not operating properly.

Q. Did you walk over to that particular defect

(Testimony of Jerome Lambert.)

immediately, or did you do some first-hand observing yourself?

A. I observed the car carefully by walking around it and to determine just if that might be the cause or if some other reason was——

Q. What parts of the car did you direct your attention to?

A. The operating mechanism under the body of the car. [31]

Q. So you did not go to either end of the car; you went under the car?

A. I went completely around the car, not under it.

Q. In going around the car, what were you looking for?

A. Any defective condition that might be apparent.

Q. When you arrived there was this air hose that you have referred to hooked up to this particular dump car?

A. The air hose was connected to it, yes.

Q. Then the first thing you did was to go under the car; was that correct?

Mr. Gearin: He did not say that, Mr. Sahlstrom.

Q. (By Mr. Sahlstrom): What was the first thing you did, is what I am trying to find out.

A. The first operation, I will repeat, was to walk around the car to observe the condition of the mechanism.

Q. What was the next thing you did?

A. The next thing perhaps was when I observed the defect, what I considered a defective condition.

(Testimony of Jerome Lambert.)

Q. What defective condition was it that you observed?

A. Since they had operated the air valves and they reported the fact that the car would not operate in a normal manner and they had not discovered what was causing the condition, I did notice that one of these lock-lever arms——

Q. Can you point to the——

Mr. Gearin: Let him finish, please, Mr. Sahlstrom. [32]

Q. (By Mr. Sahlstrom): Point out to the jury the particular arm you had reference to.

Mr. Gearin: You can continue your answer and then point out later if you would like to.

The Witness: I noticed that one of these lock-lever arms that I choose to call it for lack of a better word buckled. Since it was designed to operate in one direction, it had dropped down so that it had a tendency to operate in the opposite direction, which caused the operating arm to prevent any part of it from operating because it would work against itself.

Q. At this time will you point to the particular arm that you have reference to? I believe it is in those photographs.

(Photographs presented to the witness.)

The Witness: If you can see it, this is perhaps one of the best pictures to illustrate. This is the arm. You can see this is the side of the car that has been referred to as an apron, and at other times as the side of the car. It is both. This arm or

(Testimony of Jerome Lambert.)

lever is connected at this point and is—has a pin through it to hold it to turn on it, and there is another pin at that point, at this point this arm is fastened to the car body in such manner that it will turn, and, of course, there is two other points where—this arm is intended, I believe now I am right, to go up, and I am almost positive. It has been two years since I have seen [33] this particular car or one like it, but, as I recall, this arm is intended to move up as this side comes down. That would be the normal way for it to operate, but that arm instead of—had gone beyond that point and was buckled so that it had a tendency to pull down, but it could only go just that far so while the operation of the air by these men had been normally to operate this locking device and it would unlock and then make an attempt to fall down, but it could only open it a very short distance. I would not say how much, but it couldn't come down any further so, seeing that, I thought, "Well, perhaps that is the cause of this side not coming down."

Q. In other words, Mr. Lambert, while you were there the levers operating the air had been turned on so that you could observe that the car door would not come down because that arm was buckled; is that what you mean?

A. That is what I thought was the trouble.

Q. While you were there observing this particular dumping arm, who was manipulating the air so that you could observe that, which one of the two men; do you know?

(Testimony of Jerome Lambert.)

A. Carman Barker was operating the air valve.

Q. It was apparent to you from standing outside on what would be the, I believe geographically speaking, on the south side of the car?

A. Yes, south side. [34]

Q. And that was the side to which you were trying to dump this particular car, wasn't it?

A. Yes, it was.

Q. Then your valves that were being operated by Carman Barker would be on the east end of the car, is that correct? A. That is correct.

Q. That is the end away from and opposite from the flanger car? A. Yes, sir.

Q. Was it necessary for you to go under that car to manipulate the dumping arm, or was it done from outside of the car?

A. In an effort to correct this condition I went under the car, yes, under the car body.

Q. You went under the car body, and what did you do under there, under the car?

A. There happened to be a pick handle lying handy which seemed to serve the purpose I had for it exactly, and I picked it up, and by prying over the truck bolster which can be seen in the picture I was able to pry that arm up. It required little effort, and it immediately raised into position.

Q. As soon as you forced that dumping arm into position manually what happened?

A. The side door or apron dropped down.

Q. The air was on at that time?

A. The air was shut off. It was—the hose was

(Testimony of Jerome Lambert.)

connected, [35] but before I had gone under there Carman Barker had closed the air pressure from the ground supply beyond.

Q. But there was air from the—in the car itself, in the air lines?

A. There may have been some air in their reservoir. However, there was not enough to operate the tilting device on the car.

Q. There was enough air for the door to drop but not enough air for the entire car to dump over; is that what you mean?

A. No, it is not. The side door is not operated, is not forced down by air pressure. It is merely released, and it drops of its own weight.

Q. I see. It is air pressure that releases the locks that allow the door to drop?

A. That is right.

Q. But when you force that dumping arm into position then there is enough air in that car to release the locks for the door to drop down?

Mr. Gearin: We object to that as leading, your Honor. I had heretofore made no objections to his leading questions.

The Court: I am not going to object to leading questions. This witness can take care of himself.

Mr. Sahlstrom: May I have the question, please?

(Last question read.)

The Witness: At this time the lock had already been [36] manipulated. The air lock had already been manipulated and was released so that the door gapped open at the top perhaps a couple of inches.

(Testimony of Jerome Lambert.)

There was not an air pressure to release it after I went under the car. That had already transpired.

Q. What, then, caused the door to drop?

A. As soon as we took the buckle out of these lever arms it allowed it to drop of its own weight.

Q. At that time the two hooks, as you have referred to them on the top of the car on the edge, one was burned off, and one was in an open position; is that right?

A. It had to be to operate.

Q. Yes. Now, at that time when you went under the car it was not your intention to dump that car, was it?

A. It was intended to dump if it would dump. I had no intention one way or the other. I knew that it was possible that it would drop and probably would.

Q. But you were not trying to drop either the door or to dump the car, were you?

A. Not particularly. I was trying to just correct the defect so that it could drop.

The Court: What page of the deposition are you referring to?

Mr. Sahlstrom: I am referring to Page 11.

The Court: What questions are they? Where do they start?

Mr. Sahlstrom: Page 11, top of the page of the deposition of Jerome Lambert. [37]

Q. I will ask you, Mr. Lambert, if you recall we took your deposition on the 30th day of January, 1953. You recall that, don't you?

(Testimony of Jerome Lambert.)

A. Yes, sir.

Q. Referring to Page 11, top of the page, I will ask you if you recall this question and your answer:

“Q. The dumping mechanism was defective, and you were attempting to dump the car; is that right?

“A. No, no.

“Q. Well, tell us about that.

“A. I would say that what we were attempting to do was to make the dump mechanism operative.

“Q. You were not attempting to drop the door of the car at all? You were not attempting to make the dump mechanism work?”

Mr. Gearin: You did not read that correctly.

Mr. Sahlstrom: “Q. You were attempting to make the dumping mechanism work, isn’t that right?

“A. That is right, with this addition, that I was aware that the door might dump.”

Q. (By Mr. Sahlstrom): That is your statement, is it? A. Yes, sir.

Mr. Gearin: There is nothing impeaching about that, your Honor. [38]

The Court: No, the witness testified exactly the same way from the stand here.

Mr. Sahlstrom: Yes, that is my impression, but I wanted to clear it that you were not trying to dump the car over at that time. That is what I wanted to be certain about.

The Witness: No, we were not trying to dump the car.

Q. And when you said that you were attempting

(Testimony of Jerome Lambert.)

to make the dumping mechanism work, just what did you mean by that, to be specific?

A. Since I had been called there to assist these men in making this dumping mechanism operate, that was my whole intention, to correct this, what appeared to me this arm that was buckled or in the wrong position. It was my intention to correct that condition so that the dumping mechanism might work. Later, of course, we would correct any worn parts that might cause it to buckle that way.

Q. Mr. Lambert, before you went under that car and took that pick handle to force the dumping arm into position, did you personally inspect the locks or the hooks on the door, as you have referred to them, before forcing that arm into position?

A. Only a cursory look to see that they were unlocked, yes.

Q. Did you at that time and prior to forcing the dumping arm into position examine that car so that you knew that one of those locks was burned off on the end of the car? [39]

A. That was obvious.

Q. That was obvious. Then you knew that?

A. Yes.

Q. Was it also obvious to you that the other lock on that door was in an open position?

A. As I have said before, it was necessary for it to be in an open position to operate that apron or side in the way we intended it to be.

Mr. Sahlstrom: I move to strike that as not being responsive to the question, your Honor.

(Testimony of Jerome Lambert.)

The Court: Well, you can add that if you want to. I will strike it now. Answer the question: Was it obvious it was in an open position?

The Witness: Yes, sir.

Q. (By Mr. Sahlstrom): And so you knew then, Mr. Lambert, that if you forced that dumping arm that was buckled into position that the door might drop down?

A. No, I would not say I knew that that would happen, but I knew it was possible that it would happen.

Q. Why wouldn't that happen? Why do you say that?

A. Because there might be other defects that would—I may not have hit the right one at that time.

Q. Other defects that might hold the door in position? A. That is right.

Q. Even though you had observed Mr. Barker manipulating the [40] air, you say that this particular dumping arm was the one that was buckled and was keeping the door from coming down?

A. That is right.

Q. At the time you were under this car and you were manipulating this dumping arm what direction were you facing?

A. Well, I was under the car. I was facing the center sill; that is, the center of the car and would you would call the body bolsters of the car but toward the center of the bolster.

(Testimony of Jerome Lambert.)

Q. Geographically, would you have had your back turned to the south and be facing to the north?

A. Approximately, yes.

Q. From where you were under the car you did not observe where Mr. MacGregor was standing or where Mr. Eastman was standing?

A. It was only momentary movement——

Q. I will ask you when you were under the car if you were able to observe at that time where Mr. Eastman was standing and where Mr. MacGregor was standing? A. Not while my back was to them.

Q. That is when you were manipulating the dumping arm, isn't it? A. Yes.

Q. Did you give any warning while you were under the car before you manipulated that dumping arm as to what you were going to do? [41]

A. Not while I was under but just before I went under, yes.

Q. Did you make any statement at all while you were under the car manipulating that dumping arm? A. No, none was required.

Q. And you knew at that time that Mr. Barker, Mr. Eastman, and Mr. MacGregor were all in close proximity, didn't you? A. Yes.

Q. When you dropped that door down to the south, what happened?

A. The door came into position as it was normally——

Q. Just tell me what the next thing was you observed——

Mr. Gearin: Let him finish. You asked him a

(Testimony of Jerome Lambert.)

question. I believe the witness ought to answer it, your Honor.

Mr. Sahlstrom: Is he finished?

Mr. Gearin: I do not think he is.

The Court: I do not know if he is or not. Go ahead. Read back his answer.

(Last answer read.)

The Witness: ——intended to do before the car body was to be tilted and dumped the contents. That is the normal operation of that side door, and I believe your intention is to tell this——

The Court: Do not worry about his intention. You just answer the questions. [42]

Q. (By Mr. Sahlstrom): What is the next thing you observed? That is all I want to know.

A. I was aware of what—something had taken place because I turned around and observed Mr. Eastman in a sitting position on the ground.

Q. With relation to the dump car, approximately how far was Mr. Eastman away from that dump car when you first observed him on the ground?

A. Well, this would be just an estimate, but I would say he was about, oh, perhaps six feet from the rail; would be just a guess.

Q. Six feet to the south, do you mean, six feet to the south with relation to the direction east and west, in the dump car, how far would you say the middle of the dump car was to one end or——

A. Approximately midway, perhaps a little closer to the east end.

(Testimony of Jerome Lambert.)

Q. A little closer to the east end. All right; what did you then do next?

A. Immediately, of course, our concern was over a man being hurt in any condition so we——

Q. What did you do? That was the question.

A. Well, I questioned him as to his condition.

Q. What did he say?

A. For the moment he said nothing. He was obviously in a [43] little startled condition, if nothing else.

Q. Was he able to get up onto his own feet or his own power?

A. That I can't say. I couldn't say for sure because immediately one of the boys helped him up.

Q. Who was that?

A. Mr. MacGregor.

Q. Where was Mr. Eastman's hat?

A. His cap was laying on the ground beside him.

Q. Did you examine the cap?

A. Picked it up.

Q. What did you observe?

A. I don't know as I observed anything in particular about it because I was more interested in him than I was in the cap.

Q. Did you see some blood upon the cap?

A. I can't say for sure whether I did or not. I don't recall any right at the moment now, no.

Q. Did you observe any blood on Mr. Eastman's head?

A. Yes. I suppose I looked at it, and it seems

(Testimony of Jerome Lambert.)

to me that it—that there was a slight spot of blood there, but I am not sure that it was then or later that I observed it.

Q. All right. Now, at this time Mr. Eastman was on his feet. After the boys had helped him up, what did you do next?

A. He stood there by himself, and I probably made some solicitous remark, and he replied to the effect that he was all right. [44]

Q. Did he want to return to work in the flanger car right then?

A. Not right at the moment. That was not the next observation he made. It was something to the effect that we had better go down to the—see the nurse. I believe I made that remark at that time or thereabouts and, of course, I don't recall our exact conversation, but he said, he protested going over to see the nurse because he thought he could manage to go back to work and that he should not have been there anyway, a remark to that effect.

Mr. Sahlstrom: I move to strike that as not being responsive. I asked you what you did, Mr. Lambert. What did you do next, not what was said.

Mr. Gearin: It is a part of what took place, your Honor.

The Court: I am not going to strike it. Go ahead.

Q. (By Mr. Sahlstrom): What did you do?

A. So after a few moments and more conversation took place, among the boys, Mr. Eastman and

(Testimony of Jerome Lambert.)

myself, we started toward the repair track office.

The Court: Who is "we"?

The Witness: Mr. Eastman and myself.

Q. (By Mr. Sahlstrom): How far is that office from where this particular dump car was located?

A. I wouldn't know how to give it in a matter of feet or [45] any distance of that kind, but I would say it is just approximately one of our city blocks, perhaps the distance of one of these blocks in Portland. It is strictly a guess, though. I don't know.

Q. How many blocks?

A. A block, I would say.

Q. A block to where the car foreman was?

A. No, not to where the car foreman was but to the car foreman's office on the repair track.

Q. You walked over there with Mr. Eastman to Mr. Wood's office, the foreman's office, first, is that right?

A. That is right, we walked along talking.

Q. What was your purpose in taking Mr. Eastman over to the foreman's office?

A. I was trying to convince him that it was the proper thing for him to take him to see the nurse. We have an emergency hospital on the grounds and also we have in the car foreman's office a first-aid kit. It was my purpose to get him there, and then I would examine his head to see if there was anything that we could for it immediately.

Q. All right, now, did you take him to the foreman's office?

(Testimony of Jerome Lambert.)

A. We went to his office, and I asked him to sit down in a chair while I made out an order, a written order, for him to see the nurse at the emergency hospital.

Q. Was that a prerequisite to taking a man to the hospital? [46]

A. It is not necessary. It can be taken any time, but since we were right on our way there, why, it was the obvious thing for me to do.

Q. Did you examine Mr. Eastman's head at the foreman's office? A. I did.

Q. What did you observe at that time?

A. I observed that he had a small cut on his scalp above his forehead. I think it was not bleeding. There was nothing that I could do to help it.

Q. Did you give any first-aid at that time?

A. There was, in my opinion, no first-aid required.

Q. Then where did you take Mr. Eastman?

A. I walked with him down beside the repair track shed toward the hospital. On the way, why, we passed the mill room where his normal—normally would be working, and he wanted to leave his tools there, and I think he had a hammer with him or something, and he wanted to leave that, which he did.

Q. Where did he want to leave the hammer?

A. In the mill room, the carpenter shop.

Q. Now, going back just a little bit, I will ask you when Mr. Eastman was on his feet over there by the car and you observed his head then if you

(Testimony of Jerome Lambert.)

didn't observe blood in his hair, and I will ask you further if you did not say at that [47] time that you did not want to alarm him but you said, "Well, we must go over to see the nurse." Isn't that correct?

A. I don't believe I understand exactly what you mean.

Q. In your deposition on Page 21 I will ask you——

The Court: Ask him the question first.

Mr. Sahlstrom: Thank you.

The Court: Do not ask from the deposition. If you are going to use it for impeachment, ask the question. He said he did not understand you.

Q. (By Mr. Sahlstrom): My question was whether or not over by the car you observed blood in Mr. Eastman's hair at that time?

A. I believe I told you that I was not sure whether I did or not.

Q. I will ask you if it was not your statement at that time, "Well, we must go over to see the nurse"? A. Yes.

Q. And that was made because you did not want to alarm him; is that correct?

A. Not because I did not want to alarm him, no, that was not the reason; but it is a normal requirement.

Mr. Sahlstrom: If I may, your Honor, I would like to refer to Page 21.

The Court: That is all right now.

Mr. Sahlstrom: Thank you. [48]

(Testimony of Jerome Lambert.)

Q. In the deposition near the middle of the page, Question: "What happened then? Answer: "His cap was lying on the ground, and I looked at his head, and I could see that there was a sign of blood in his hair, and not wishing to alarm him I made no mention of it. I said, 'Well, we must go over to see the nurse.' "

That is your statement, isn't it?

A. Yes, that is probably right, too.

Q. You then walked with Mr. Eastman from the foreman's office over to the first-aid station, is that correct?

A. No, after going by the mill room and leaving his tools or hammer, whatever it was, we continued on in that direction. On the way we passed the office where the car foreman, that is the departmental car foreman, master car repair, have their offices, and I stopped in there to see if our foreman, Mr. Wood, was in, which he was, and called him out and made a report of what had taken place out on the track.

Q. Proceed.

A. And he stepped out of the office and came over to where Eastman and myself were, and he looked at Mr. Eastman's head, and I told him what we intended to do is have him go over to the nurse, and Mr. Eastman said he could go over by himself. He would take care of him himself, handed him the doctor's order, and Mr. Wood agreed with me that he should do so immediately in spite of any protests he might make, and we allowed him to go. [49]

(Testimony of Jerome Lambert.)

I offered to go with him, and he protested that, said he could take care of himself, and there was no reason that I could observe why he should not go, and that was the last I saw of him.

Q. The last you saw him was when he was walking down toward the first-aid station?

A. Yes, sir.

Q. You never went back over there again afterwards to observe his condition?

A. No, I did not.

Q. Did you yourself call a doctor for Mr. Eastman directly after this accident?

A. There was no occasion to call a doctor.

Q. Well, just did you call him; that is all?

A. No.

The Court: He did not call one.

Q. (By Mr. Sahlstrom): Approximately how wide is the dump car door on this particular dump car?

A. I would estimate it to be about, oh, perhaps 30 inches wide.

Q. When that door drops down to a horizontal position, in your best judgment how far would that door be from the ground or the rails?

A. Well, both of those distances would be different because, [50] of course, the height from the rail to the door would be less than from the ground.

Q. Give us both distances, then.

A. Pardon?

Q. Give us both of the distances, in your best judgment.

(Testimony of Jerome Lambert.)

A. I would imagine it would be less than six feet from the ground to the bottom of this dump car body, and the distance from the rail would be less. It would be less the thickness of the tie plus the rail on top of it. That would be perhaps a foot less so less than five feet from the top of the rail to the bottom of the car body. These are estimates now. I don't know exactly.

Q. Do I understand it correctly that when the door is in a horizontal position it would be about four feet, you say, down to the rails, or five feet?

A. No, it would be between five and six feet.

Q. Five and six feet. Thank you.

How far, again, is the first-aid station from where this accident occurred? Give it to us in city blocks.

A. Well, it would be at least three city blocks, I would say.

Q. When you observed Mr. Eastman after the accident, did you observe any eye changes?

A. No, not particularly.

Q. Did you look for any?

A. Well, yes, not specifically, but I observed his whole condition in a glance. [51]

Q. Did you notice that his face was flushed?

A. No, it was not flushed.

Q. Did you notice that his speech was at all incoherent?

A. Oh, no; no, it was not.

Q. Are you the immediate supervisor to Mr. Eastman, or were you?

(Testimony of Jerome Lambert.)

A. I don't know just how you mean that, but I was—the only supervisor that had control of these men was Foreman Carl Wood. I was lead workman delegated to lead and direct these men in this operation.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Lambert, how long did it take you, can you tell us, from the time you went under the side of the car with that pick handle to work on the arm until the time the door came down?

A. A matter of a minute or not to exceed two minutes or something like that; a very short time.

Q. Where was Mr. Eastman the last time that you saw him before you went under?

A. He was standing beside Mr. MacGregor well in the clear of this car.

Mr. Gearin: I have no further questions. [52]

Mr. Sahlstrom: No further questions. Thank you.

The Court: That is all.

(Witness excused.) [53]

AUSTIN E. BARKER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Austin E. Barker.)

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please.

A. Austin E. Barker.

Q. And your address?

A. 988 West Third, Eugene.

Q. Where are you employed?

A. Southern Pacific Company.

Q. In what capacity? A. Carman.

Q. How long have you been employed by the Southern Pacific Company?

A. Since 1923.

Q. You are employed in Eugene at the present time in the repair yards?

A. At the present time, yes.

Q. On October 16 of 1952 were you employed in the Eugene yards? A. Yes, sir.

Q. Of the Southern Pacific Company?

A. Yes.

Q. What was your job at that time? [54]

A. Carman.

Q. Carman, and do you have any particular classification as a mill man or as an upholsterer or as a car inspector? A. Not at that time.

Q. Do you at this time? A. No, sir.

Q. Were you acquainted with Eric Gunner Eastman, the deceased? A. Yes, sir.

Q. How long had you known him?

A. I don't know exactly.

Q. Approximately, to your best judgment?

The Court: Was it more than five years?

(Testimony of Austin E. Barker.)

The Witness: Yes.

The Court: Proceed.

Q. (By Mr. Sahlstrom): You had worked with Mr. Eastman there in the repair yards; had you not? A. Not with him, no.

Q. You had worked on the same crew; had you not?

A. Do you mean on that particular job?

Q. No, you worked on the same crew of men with Mr. Eastman; did you not? You were all carmen? A. Yes.

Q. On October 16, 1952, and prior thereto you were working on various kinds of cars there in the yard, were you not? A. Yes, sir. [55]

Q. Those cars came from other states and went from Eugene to other states, other different states, didn't they? A. Yes, sir.

Q. You worked upon all kinds of different cars, didn't you? A. Yes, sir.

Q. Prior to October of 1952 had you ever worked upon a Clark type of western dump?

A. What was the question again?

Q. Prior to October 16th of 1952 had you ever worked upon a Clark type of western dump car?

A. I don't know whether I had or not.

Q. Do you think you did, or didn't you?

Mr. Gearin: He said he didn't know.

The Witness: I don't know whether—there ain't very many of them come through.

Q. (By Mr. Sahlstrom): On this particular day

(Testimony of Austin E. Barker.)

What time did you start your work day, what time?

A. Seven-thirty.

Q. What is your best judgment as to the time this accident happened?

A. I don't know exactly. I didn't look at my watch or anything.

Q. Can you tell us approximately?

A. Oh, around 8:30 to 9:00 o'clock, I imagine.

Q. At the time of the accident, prior thereto you had been [56] working on this dump car with Mr. MacGregor, hadn't you?

A. What is that?

Q. Prior to the accident you had been working on this dump car with Mr. MacGregor, hadn't you?

A. I don't understand the question yet.

(Last question read by reporter.)

The Witness: Yes.

Q. (By Mr. Sahlstrom): You know Mr. MacGregor, don't you?

A. Yes.

Q. Tell us exactly what your understanding was as to what you were supposed to do with this particular dump car?

A. We went down there to find out what was the matter with it.

Q. Who was it that hooked the air up to this dump car?

A. I did.

Q. Just the two of you, you and Mr. MacGregor were working on this car at first; is that right?

A. That is right.

Q. What was your purpose in hooking up the air to the car?

A. I had "bad order dumps" on it.

(Testimony of Austin E. Barker.)

Q. You were trying to dump the car?

A. Right.

Q. With what success?

A. We didn't have any success.

Q. Why not?

A. Because it didn't dump right. [57]

Q. Did you apply the levers yourself that would make this car dump after the air was hooked up?

A. Yes, sir.

Q. How far through this dumping operation would the car go?

A. As I remember, it didn't go at all.

Q. Who was it that opened the door locks on the south side of the car? A. I don't remember.

Q. Would it have been either you or Mr. MacGregor? A. Yes, sir.

Q. Do you know of your own knowledge whether or not one of the door locks on the south side of that dump car had been burned off?

A. I didn't notice it.

Q. Did you look? A. What is that?

Q. Did you look to see if it had been burned off?

A. No, sir.

Q. Did you know that the door locks on the south side of that car were either burned off or in an open position prior to manipulation by Mr. Lambert of the dumping mechanism?

A. It was in an open position.

Q. What?

A. The lock was in an open position.

Q. Did you know that at that time? A. Yes.

(Testimony of Austin E. Barker.)

Q. How did you know that?

A. Well, the door was down a little.

Q. You knew after the door fell they had to be in open position? A. No.

Q. Well, then, how did you know that those locks were in open position?

A. Because the door was down a little bit.

Q. I beg your pardon?

A. The door was open just a little bit.

Q. A little bit. In other words, the door was open over a little bit, you mean, from the car itself?

A. Just a little when we started.

Q. So that if there was some manipulation the gravity would cause the door to come down; is that what you mean?

A. Before we started to work it, you mean?

Q. No, after you started working.

A. After we started working it, yes.

Q. You are not acquainted with the particular mechanism of this car, are you? A. No, sir.

Q. That is why you called Mr. Lambert over, isn't it? A. That is right.

Q. Who was it that turned the pistons on the end of this [59] dump car so that the car would dump? A. Mr. MacGregor and I.

Q. Did it take two men for the job?

A. Should be, yes.

Q. Tell the jury how you did that.

A. Took that pin out and swung the piston around.

Q. In other words, the piston on the end of the

(Testimony of Austin E. Barker.)

car hooked up with rubber hoses so that two men could pick the piston up and turn it to either side; is that what you mean?

A. No, sir, take a pin out and swing it around, just swing it.

Q. You have to take the pin out first and then swing it around? A. Yes.

Q. If you swing it around, then is there some portion of that piston that has a ram that comes out of it when the air is hooked up with it that forces the door open?

A. It forces out, yes.

Q. That is what forces the door open, isn't it?

A. Yes, sir.

Mr. Sahlstrom: I would like to have these presented to the witness.

(Photographs presented to the witness.)

Q. At the very bottom of that series of photographs, Mr. Barker, the very bottom of that group, there are some small [60] photographs to illustrate the end of the car where the piston is. If you find a photograph there show the jury where the piston is that you have referred to in your testimony.

A. Right here, above this pin here, swinging around. (Indicating.)

Q. What portion of that piston is it that forces the door open?

A. This is it right here. (Indicating).

Q. When Mr. Lambert was under the car where were you?

A. I was on the opposite side of the car.

(Testimony of Austin E. Barker.)

Q. Geographically, that would be over on the north side; is that right? A. Yes.

Q. At that time when Mr. Lambert was under the car the air was still hooked up with the dump car; was it not? A. No, sir.

Q. It was still hooked up with it, was it not?

A. There wasn't no air in it.

Q. Was the air hose hooked up with the dump car?

A. I disconnected it, but I wouldn't say whether it was right then or just after. No, it was disconnected then.

Q. I beg your pardon?

A. It was disconnected then.

Mr. Gearin: You mean when Mr. Lambert was under the car?

The Witness: Yes. [61]

Mr. Sahlstrom: Q. Prior to that time had you been manipulating the levers on the end of the car that make the air go into the car to dump the car? Had you been doing that?

A. Before that, before we was taking the air out, yes.

Q. That is one of the first things you did there, was to hook the air up with the car; isn't that right? A. The first thing, yes.

Q. Then you worked those levers back and forth to try and make the air go into the car and dump the car; isn't that right? A. That is right.

Q. So there was air in the car then; was there not? A. At one time, yes.

Q. You did not see this accident happen, did you? A. No, sir.

(Testimony of Austin E. Barker.)

Q Did you see Mr. Eastman after the accident?

A. Yes, sir.

Q. Where was he when you first saw him?

A. He was kind of laying on the ground.

Q. Did you help him up to his feet?

A. No, sir.

Q. Who did that?

A. Well, Mr. MacGregor had his hand on him. I don't know how much he helped him.

Q. You heard the door drop; then you came around the car; is that right? [62]

A. That is right.

Q. You were surprised to hear the door drop; is that right? A. Yes.

Q. When you got over there the door had already come down and hit him on the head?

A. That is right.

Q. That is the first you knew about that?

A. That is when I first——

Q. To your knowledge, was the dump car coupled with the flanger car?

A. No, sir, it was not coupled.

Q. Were the air hoses hooked up with the flanger car? A. No, sir.

Q. What is your best judgment as to how far away the flanger car was from the end of the dump car at the time of the accident?

A. Well, we had been walking through there, but I don't know exactly how far.

Q. Would you say two or three feet or thereabouts?

(Testimony of Austin E. Barker.)

A. Oh, around that, I imagine, plenty of room for a man to walk through.

Q. Was there any blue flag placed at either end of that dump car before you started to work on it?

A. The track was flagged.

Q. How far away were those flags from the dump car, approximately?

A. Oh, I don't really know. [63]

Q. You mean the entire track No. 15 for its entire whole length was flagged; is that what you mean?

A. Yes, that is what I mean.

Q. By the blue flag?

A. It had a flag on it, yes.

Q. Did you see the flag? A. Yes.

Q. Were there any flags right immediately near the dump car?

A. Not right close to it I don't suppose.

Q. The only flags that you know about were the ones—

A. On the track.

Q. —that are on the end of the track; is that right?

A. That is right.

Q. How long are those tracks at that point, approximately, in city blocks?

A. Oh, I don't know how long they are.

Q. In your best judgment, how many blocks would it be?

A. Oh, that is hard to guess. I would say 700 feet, seven or eight hundred feet.

Q. Did you observe any barricade or other blocking-off of this particular dump car?

A. This particular one?

(Testimony of Austin E. Barker.)

Q. Yes. A. No, sir.

Q. The area was not blocked off or marked off by flags? [64] A. No, sir.

Q. Had you seen Eastman working on the flanger car? A. No, sir.

Q. You do not know what kind of work he was doing on the flanger car?

A. No, sir, I do not.

Q. You know he was working on the flanger car, don't you?

A. No, I didn't even know if he was working on it.

Q. Did you call the doctor after Mr. Eastman was hurt? A. No, sir.

Q. Are you aware of the company rule No. 4225? Mr. Gearin: That is immaterial.

The Witness: No, sir, I am not aware of it.

Mr. Sahlstrom: Q. You have read your safety rules; have you not? A. Yes, sir.

Q. Do you recall that particular rule?

A. No, I do not.

The Court: I think it would be quite difficult for a person to remember 4,000 rules. You had better read the rule to him.

Q. Yes, your Honor. I think Mr. Gearin has the same rule book, your Honor.

The Court: I do not understand the relevancy. Would you mind telling me? [65]

Mr. Gearin: Yes, your Honor, company rule No. 4225 requires that in the event of accident that a company surgeon——

Testimony of Austin E. Barker.)

The Court: No, no.

Mr. Gearin: I will read the rule to your Honor.

The Court: I know the rule, I am looking at it. Are you going to have testimony here by a physician to the effect that if they had called a physician or surgeon this man would be alive?

Mr. Sahlstrom: No, we are not going to have a physician here.

The Court: The objection is sustained. Do not answer the question. If you bring on testimony of that kind we will let you go ahead. We are not going to let you inject this kind of thing in this trial. Proceed with your next question.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Barker, while you were out there manipulating the valves for the air mechanism did you give any warning to Mr. Eastman?

A. Yes, sir.

Q. What did you tell him?

A. I told him, "You better get back out of the way. You might get hurt."

Mr. Sahlstrom: Your Honor, we object to that question and [66] ask that the answer be stricken for the reason that it is too remote in time. This is prior to the accident time.

The Court: Read the question.

(Last question read.)

The Court: How long was that before the accident?

(Testimony of Austin E. Barker.)

The Witness: Oh, that was—I couldn't say exactly; a few minutes though.

The Court: Was it less than 15 minutes?

The Witness: Oh, yes, I would say so.

The Court: The motion is denied, and the witness may be permitted to answer.

Mr. Sahlstrom: He has answered, your Honor. The witness has answered.

The Court: I did not hear the answer.

(Last answer read.)

Mr. Gearin: I have no further questions, your Honor.

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Barker, when you were operating those levers to try and dump that car that was some time before Mr. Lambert came along; isn't that right?

A. Yes.

Q. And after a time you could not dump the car, and then you got Mr. Lambert to come over and help; is that right? A. Yes. [67]

Q. So when you gave this warning to Mr. Eastman that was when you were operating the valves some time before; was it not?

A. That is right.

Q. You gave no warning to Mr. Eastman at all at the time Mr. Lambert was under the car and was trying to bring this door down, did you?

A. No, sir.

Mr. Sahlstrom: No further questions.

Mr. Gearin: Q. You were way on the other side

(Testimony of Austin E. Barker.)

of the car, I take it? A. Yes.

Mr. Gearin: I have nothing further.

Mr. Sahlstrom: No further questions.

(Witness excused.)

The Court: Ladies and gentlemen, we will take a 10-minute recess.

(Jury retired for recess.)

(Thereupon, the following proceedings were had out of the presence of the jury:)

The Court: On the basis of your representation that you will have no medical testimony to show causal connection between failure to comply with rule 4225 on the death of the decedent, Eric Gunner Eastman, I am withdrawing contentions 10 and 11. If you offer to bring in medical testimony showing the relationship, of course, I will let that testimony come in. [68]

Mr. Sahlstrom: I would like to have the right to reserve that point later on in the trial.

The Court: Yes, you may do that.

Mr. Sahlstrom: I may bring him up later on, your Honor.

The Court: I was going to say you might need a different type of pleading. That would not be involved in this lawsuit. Is that not a separate cause of action based upon negligence of the company in failing to provide adequate medical care?

Mr. Sahlstrom: That is one point, your Honor. The other point would have been that his conscious pain would have been reduced had a doctor been

called. His conscious pain and suffering would have been reduced had a doctor been called.

The Court: It is quite remote, and the testimony so far from the witnesses whom you have called indicates that none of them felt that he was seriously injured, neither of these two witnesses. We will reserve the point and take our recess for 10 minutes.

(Recess.)

CARL M. WOOD

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please.

A. Carl Myron Wood.

Q. Where do you live?

A. Eugene, Oregon.

Q. By whom are you employed?

A. Southern Pacific.

Q. How long have you been employed by Southern Pacific Company?

A. Nearly 21 years.

Q. What is your present capacity?

A. Car foreman.

Q. What do your duties consist of?

A. Supervising freight repairs, Eugene shop.

Q. On October 16, 1952, what was your job at that time? A. Relief outfit foreman.

Q. You have had a raise, then?

A. Not a raise: just a different position.

(Testimony of Carl M. Wood.)

Q. More authority?

A. No, the authority is about the same.

Q. Where is the mill located where Mr. Eastman worked; where is that located? [70]

A. Just about the center of the car shop shed on—adjacent to Track 18.

Q. What kind of equipment is located in that particular mill where Eastman worked?

A. Electric-powered saws and, let's see, there is a joiner, rip saw, cutoff saw, and band saw.

Q. And his job was pretty well established, was it not? He worked in that mill pretty much of the time; isn't that right?

A. Yes, and also he was on other jobs when his time was not fully occupied as a mill man.

Q. He would go out, for example, and work in the repair yard; is that right, work on cars?

A. Yes.

Q. He worked on all kinds of cars, all types?

A. Yes, I would say all kinds and types.

Q. On October 16, 1952, and just prior thereto his duties at that time were to work on all types of cars, isn't that correct? A. Yes.

Mr. Gearin: You are speaking of Mr. Eastman, are you?

Mr. Sahlstrom: Yes, Mr. Eastman.

The Witness: Along with his mill work.

Q. That and the mill work, too, isn't that right?

A. Yes, sir.

Q. And those cars came from out of the state,

(Testimony of Carl M. Wood.)

came to Eugene, and went to other states, isn't that right? A. Yes, sir.

Q. As a mill man, he is somewhat of a carpenter; isn't that correct? A. Yes.

Q. For example, he would have to do some work in the mill, then walk out to some of the cars, repair the seats and upholstering, and so forth, is that right? A. Yes, sir.

Q. Where would these materials that he would have to use in connection with these car repairs be located?

A. Specifically what materials do you mean, lumber?

Q. For example, if he had to have lumber of some other decking for a car, where was that material kept?

A. Lumber is kept directly across from the mill in a storage—we have a storage there.

Q. Where would his tools be kept?

A. Usually his tools are kept in a drawer in the mill.

Q. Then if he, for example, were working on a car out on Track No. 15 he may have to go back to the mill to get some lumber, some supplies, some tools, go back and forth; isn't that right?

A. Very possibly, yes. [72]

Q. But his particular job is more or less established there in the mill, was it not?

A. Yes, he was listed as a mill man.

Q. It was not necessary for you to tell him

(Testimony of Carl M. Wood.)

every day what to do because his job was established? A. Correct.

Q. I suppose on occasions you would have, though, to refer to some particular work that you wanted to have him work on; is that right?

A. Yes, my——

Q. That would be your job——

Mr. Gearin: Let him finish first.

The Witness: The job might require one or two days to be working in conjunction with his mill work.

Mr. Sahlstrom: Q. He may be working out in the yard on one car for two days?

A. Possibly, yes.

Q. Then again he might work in the mill for perhaps a week without going out to the yard at all, is that right?

A. Yes, if there was a lot of yard work to be done.

Q. But if he was working in the mill he would still be working on materials for repairing these cars; isn't that also correct?

A. Yes, usually.

Q. Do you know who it was that gave some instruction or [73] direction to Mr. Eastman to work on this particular flanger car that he was working on the day of the accident?

A. Yes, it was me.

Q. Do you know about when it was that you had talked to him about working on the flanger car?

(Testimony of Carl M. Wood.)

A. Not the exact day. It was a few days previous, maybe one day previous.

Q. A few days previous to the accident or maybe one day? A. Yes.

Q. So the day of the accident, why, he knew pretty well what he had to do that day?

A. Yes, sir.

Q. When you talked to him about that, you did not specify any particular time he had to work on this flanger car, did you? A. No.

Q. But he could do it more or less with his working with other work, with his other activities; is that what you mean?

A. Yes, when his mill work was caught up, he could work on the other car.

Q. I suppose, then, it was your intention that if he had some work to do on this flanger car he would do that, and if he had some work that came up suddenly in the mill he would do that, too, wouldn't he? [74] A. Yes, sir.

Q. Do you know what kind of job that had to be done to this particular flanger, what it was he had to do out there? A. Yes, I do.

Q. What was it?

A. Well, the flanger had to have the seats moved from one side to the other, and this is for better operation of the flanger.

Q. Do you know what kind of material he would have to use in connection with that work in the flanger car?

A. Oh, I could estimate it for you, yes.

Testimony of Carl M. Wood.)

Q. He would have to use lumber, would he?

A. There would be some lumber involved in making brackets for the seats.

Q. Would he have to do work on that lumber in the mill, for example, too, using the power saws or something like that?

A. Very doubtful.

Q. But he might have to?

A. He might, yes.

Q. At least, that is where the tools were kept, and if he had some work to do on this lumber for a car to fit a piece of lumber into that particular car he would have to go back to the mill, wouldn't he?

A. Yes, if it were necessary. [75]

Q. That would be in his discretion, would it not, to determine whether he should go back to the mill, back to the flanger car, and so forth?

A. Yes.

Q. He would not have to come and ask you about that, would he?

A. Not unless he ran into something that he needed information on that he would ask me.

Q. If he had some problem that came up, he would come and see you about it?

A. Correct.

Q. You did not see this accident happen, did you?

A. No, I did not.

Q. You saw Mr. Eastman after the accident, though, didn't you?

A. I did.

Q. Where was it you first saw him?

A. In the Master Car Repairs Office.

Q. What direction is that from where those particular dump and flanger cars were located, see-

(Testimony of Carl M. Wood.)

graphical direction? A. Geographical?

Q. Not railway.

A. Well, it would be westerly, I would say, toward Portland.

Q. West toward Portland? About how far was that away from the dump car and the flanger car?

A. Well, I would estimate about three blocks, two or three blocks. It might be around there.

Q. Then how far is it from your office, then, over to this hospital unit or this first-aid unit that he was being taken to?

A. Did you say from my office?

Q. Yes.

A. I was not at my office when I saw Mr. Eastman.

Q. Oh, where were you?

A. I was at the Master Car Repairer's Office.

Q. Then how far is it from that point on to this hospital unit?

A. Oh, I would say maybe two blocks, estimate.

Q. When you saw Mr. Eastman for the first time, he was walking with Mr. Lambert; is that correct?

A. Yes, sir.

Q. Did you notice any blood in his hair and on his head?

A. Not at first, no.

Q. Some time afterwards did you?

A. Yes, I asked to inspect his injury.

Q. Where was that? Where did that take place?

A. Outside the Master Car Repairer's office.

Q. What did you observe?

A. Do you want me to describe the injury?

(Testimony of Carl M. Wood.)

Q. Yes, if you will. [77]

A. Well, there seemed to be just a small cut, I would judge an inch and a half long, on the top portion of his head. There was very little blood, and it didn't seem to amount to very much.

Q. Up in the frontal lobe of the head; is that what you mean?

A. I would say about in here is where I observed it.

Q. About in the middle of the head?

A. Yes, a little back from——

Q. The top? A. Yes.

Q. You have seen this particular dump car that caused this injury, have you not?

A. Yes, sir.

Q. Can you estimate for us or give us your best judgment as to how much the weight of the door that dropped down would be?

A. I would hesitate to estimate. If I had——

Q. Give us your best judgment about it.

A. Between two and three thousand pounds; ton and a half about.

Q. After you saw Mr. Eastman did you walk over with him to the first-aid station?

A. No, I did not.

Q. You just observed him walk over there? [78]

A. Pardon?

Q. You observed him walk over there, though?

A. He started out toward the hospital, emergency.

(Testimony of Carl M. Wood.)

Q. About what time was it that you first saw Mr. Eastman directly after the accident?

A. About 9:00 o'clock in the morning.

Q. Then what time was it when you next saw him? A. Oh, about 9:45.

Q. Where was that?

A. At the emergency hospital.

Q. What was the occasion for your going over there at that time?

A. The nurse had phoned over and asked for either——

Q. Well, you cannot say what she said. It was your understanding that you should go over there; is that right? A. Yes.

Q. When you went over there, what did you observe as to Mr. Eastman's condition?

A. Well, Mr. Eastman was sitting on a bench just inside the door of the emergency hospital, and he appeared—he did not appear to understand anything you said to him, and he was talking incoherently, and he was in a more or less relaxed position sitting a little sideways.

Q. Was his face flushed?

A. I did not notice. I couldn't say. [79]

Q. That was at 9:45 about?

A. Approximately, yes.

Q. Did he make any expressions of pain at that time? A. No.

Q. At some later time did he?

A. I didn't see him later, much later after that.

Q. I beg your pardon?

(Testimony of Carl M. Wood.)

A. I didn't see him much later after that, only a few minutes until the ambulance came.

Q. Did you call the ambulance?

A. No, the nurse called it; the nurse did.

Q. Do you know what time the ambulance was called?

A. Approximately 10:00 o'clock is the best I could say.

Q. Did you help Mr. Eastman into the ambulance? A. No, I did not.

Q. Why not?

A. Well, there was an ambulance driver and attendant to take care of him.

Q. Was he unconscious at that time?

A. No, not unconscious.

Q. Had he suffered a convulsion at that time?

Mr. Gearin: I think the witness is incompetent to testify if he knows what a convulsion is.

Mr. Sahlstrom: Q. Do you know of your own knowledge whether or not Mr. Eastman had suffered a convulsion prior to going to the hospital?

A. No, I don't.

Q. Would you recognize a convulsion if you saw one? A. I don't know.

Q. You knew his speech was incoherent?

A. Yes, at that time.

Q. And you noticed that, and did you notice eye changes at all?

A. I did not notice eye changes at all.

Q. Did you look for them specifically or just didn't happen to notice them?

(Testimony of Carl M. Wood.)

A. I did not look specific.

Q. What is your best judgment now as to the time when Mr. Eastman left in the ambulance for the hospital.

A. I said about 10:00 o'clock.

Q. Did you stay with him all that time from 1:45 until 10:00 o'clock?

A. Until the ambulance came?

Q. Yes. A. Yes.

Q. Was he walking about the office?

A. No, he remained sitting on the bench.

Q. Was he covered by a blanket?

A. No, he was in a half-sitting position.

Q. Did he indicate to you that he wanted to go back to work? [81]

A. Right at that time?

Q. Well, at any time. A. Yes, he did.

Q. When was that?

A. When Mr. Lambert brought him to me near Mr. Stockton's office before he was sent to the nurse.

Q. He wanted to go back to the flanger car and go to work? A. He did.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Was at any time Mr. Eastman assigned to do any work in connection with the dump car?

A. Not while under my supervision.

Q. Specifically, on the day he was hired, was he,

(Testimony of Carl M. Wood.)

as far as you know, assigned to do any work on the dump car? A. No.

Q. When you first saw Mr. Eastman when he was with Mr. Lambert what was his physical appearance?

A. He appeared physically okeh.

Q. What is the purpose of a blue flag around railroad cars?

A. Well, to protect workmen that are working on or about cars.

Q. From what? [82]

A. From any—from switching in against cars or working on them.

Mr. Sahlstrom: May it please the Court, this is improper cross examination, beyond the scope of the direct examination.

Mr. Gearin: I understand that, your Honor. It is only for the sake of saving time. I would like to make the witness my own witness for this particular limited purpose.

The Court: Proceed.

Mr. Gearin: Q. What is Track 15 used for?

A. For repair of cars.

Q. What, if anything, do they have around there for any protection that they have on Track 15 against switching engines or other engines?

A. On No. 15 track instead of a blue flag we use the proper red flag, and the switch is locked with the car department locks so they cannot get in with an engine.

Q. In other words, there is no danger at all

(Testimony of Carl M. Wood.)

from any moving equipment getting in there to bother a car where these men are working?

A. Correct.

Mr. Gearin: I have nothing further. [83]

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Wood, do you know what the blue flag rule is? A. Yes, Rule 26.

Q. Do you have a copy of your agreement with you that sets forth the blue flag rule?

A. No, I do not have it with me.

Q. Do you know if it is stated in this motor car and power department agreement?

A. Yes.

Q. Do you know what the blue flag agreement is in this book, the company rule?

The Court: He says Rule 26.

Mr. Sahlstrom: Within Rule 26 of the Interstate Commerce Commission, but is it also in this particular working agreement?

The Witness: I believe it is. I couldn't swear to it without looking in the book.

Q. Could you locate it?

A. I think I could.

The Court: I do not understand the relevancy of the blue flag rule.

(Discussion between Court and counsel.)

The Court: Let us do the arguing a little later. Are you going to have a witness on the blue flag?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Carl M. Wood.)

The Court: Do you know where the blue flag provision is?

The Witness: This is not a company rule here. This is the union agreement, is all this is. This is protection of employees according to the union agreement with the company. It is stated all throughout——

Mr. Sahlstrom: It is in your '48 rule, the red book that Mr. Gearin has.

The Court: I still do not understand the relevancy, Mr. Sahlstrom. Are you contending that Mr. Eastman did not know that people were working on this dump car?

Mr. Sahlstrom: Our position is, your Honor, that Mr. Eastman did not know of the particular dangers of this particular car and that they were trying to dump the car at that time and that we will have experts here on proper railway practice for having blocked off the car before working on the car.

The Court: Are those experts who say that if a man who knows people are working on a car, that they should have a blue flag anyhow?

Mr. Sahlstrom: Yes, sir; it is absolutely positive. They must have a blue flag anyway. It is very important.

The Witness: I think that this is incorporated with the company Rule No. 4211. [85]

Mr. Sahlstrom: Q. Is the blue flag rule given there by itself?

A. Yes, it is included in this rule.

(Testimony of Carl M. Wood.)

The Court: Let us hear it.

The Witness: Do you want it complete?

The Court: How long is it?

The Witness: Oh, about a page, I guess.

The Court: Are you offering that, Mr. Sahlstrom?

Mr. Sahlstrom: I would like to have the rule read, your Honor, if we may.

The Court: Go ahead; read it.

The Witness: Do you want me to read 4211?

The Court: Yes.

(Witness then read Rule No. 4211.)

The Court: All right. He has read it. Do you want to ask him any further questions?

Mr. Sahlstrom: I believe Mr. Gearin was asking this question, your Honor. I have not started redirect, your Honor.

The Court: I think you have. You were the one asking him these questions at least. Mr. Gearin had finished.

Mr. Sahlstrom: I thought he had asked the first question. I will proceed.

Q. Do you know of your knowledge if at the time of this accident and at this particular location any blue flags had [86] been placed on the Track No. 15?

A. Well, the proper red flags were in place, yes.

Q. Well, a red flag was placed?

A. This is a repair track, you understand, where the red flag is required.

(Testimony of Carl M. Wood.)

Q. The question was: Was any blue flag placed on Track 15? A. No.

Q. Prior to the accident?

A. Not blue flags.

Q. You heard Mr. Barker testify, or Mr. Lambert testify that a flag was placed about 700 feet up the track from the scene of the accident; is that about right?

A. Well, that is the opposite end of the track. It is locked and flagged, also.

Q. That is the only flag that you know that was located at that particular location? A. No.

Q. What?

A. No. There was one at the end, the same end on which the car was located, too. It is a—the track was locked and flagged on both ends, both ends of the track.

Q. Approximately how far in feet from this particular car were those flags placed?

A. Well, one flag about 50 feet. [87]

Q. That was the end of the track?

A. Yes.

Q. And which end?

A. The Eugene end, east end.

Q. That would be on the east end, and the other flag on the west end of the track, how far away was that?

A. About 700 feet, estimate.

Q. That is just a red flag?

A. Yes, it is.

Mr. Sahlstrom: No further questions.

(Testimony of Carl M. Wood.)

Recross Examination

By Mr. Gearin:

Q. Were the switches locked on both ends of this dump car and the flanger car?

A. Yes, sir.

Q. I mean on the track, at both ends of the track? A. Both ends of the track.

Q. Is it possible under those circumstances to couple onto those cars? A. No, sir.

Mr. Gearin: Nothing further, your Honor.

Mr. Sahlstrom: That is all.

(Witness excused.) [88]

BRUCE MacGREGOR

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Bruce MacGregor?

A. Yes; that is right.

Q. Mr. MacGregor, now do I speak loud enough so that you can hear me? A. That is right.

Q. How old are you, Mr. MacGregor?

A. I am 64 years old.

Q. Are you married? A. Yes, sir.

Q. By whom are you presently employed?

A. Southern Pacific.

Q. How long have you worked for the Southern Pacific Company?

A. Twenty—going on 27 years.

(Testimony of Bruce MacGregor.)

Q. Mr. MacGregor, during the time that you have worked for the railroad company how long or what kind of jobs have you had?

A. Well, I am mostly cooking and dishwashing.

Q. Cooking and dishwashing?

A. Well, yes, I do everything. I am a cook and relief outfit.

Q. Are you doing that in Eugene today? [89]

A. Not today.

Q. I mean now and the last week, the week before that?

A. Whenever it goes out I do that, emergency.

Q. What is your job classification?

A. I am classed as a car repairman.

Q. A car repairman? A. That is right.

Q. But you actually work as a relief cook?

A. That is right.

Q. Mr. MacGregor, how long have you worked in Eugene? A. All of it.

Q. All of the 27 years? A. That is right.

Q. In all of those 27 years have you worked as relief cook but under the job classification of repairman?

A. No, I wasn't. At one time I was on a crane working on a relief outfit. Then about 16 or 17 years ago I was put in as a cook.

Q. Mr. MacGregor, during the time over the years that you have worked you have become very familiar with the yards at Eugene; have you not, the railroad yards?

A. Well, not the yards not so much, no, because

(Testimony of Bruce MacGregor.)

I didn't ever inspect it much.

Q. Well, you know where the yards are and you see them all the time, you are around in the yards; are you not? [90]

A. Are you referring to the yards or the repair track?

Q. Let us take both of them; let us take the repair track.

A. Well, I am familiar with the repair track, yes.

Q. Where is the mill room in connection with the repair track?

A. Where was the mill from what?

Q. Where is the mill room from the repair track?

A. You mean any repair track that is there?

Q. Let us take from repair track 15.

A. Well, now, if you wanted to know just where the location of 15 is, it would be, I would say, not over 50 feet from the mill room.

Q. Which direction does the Track No. 15 run?

A. Well, I suppose geographically then, well, that would be east and west.

Q. East and west? A. Yes.

Q. Track 15 runs then east and west, and about how long is Track No. 15 in point of feet?

A. I would say 800 feet.

Q. Eight hundred feet? A. Yes.

Q. Is Track 15 used as a repair track all the time? A. No.

Q. What is it generally used for?

(Testimony of Bruce MacGregor.)

A. Well, it is used for different things. It is used for, [91] just like we were working that day and dumping these cars at the lower end and then for overload or just a——

Q. Just a spare track?

A. For overload and then to store material that comes in from the other end on that.

Q. Mr. MacGregor, did you know Eric Gunner Eastman?

A. He was a good friend of mine, yes, sir.

Q. Did he have a nickname?

A. Yes, we called him Ole.

Q. Ole Eastman? A. That is right.

Q. Did he speak with an accent?

Mr. Gearin: This is immaterial.

A. Well, a wee bit, yes.

Q. He was Swedish; was he not?

A. What?

Mr. Gearin: This is immaterial.

Mr. Peterson: I will ask the question. It really is immaterial.

The Court: What are you trying to show by that?

Mr. Peterson: I want to show his earning capacity and the kind of work that he did which involves his person and character of Mr. Eastman, the decedent.

The Court: You mean that it is harder for a man to get a job if he has a Swedish accent? [92]

Mr. Peterson: Not because of a Swedish accent but because he might have some difficulty, it is part

(Testimony of Bruce MacGregor.)

of the thing that the jury may consider as to his earning capacity. I will withdraw the question. Objection was made to it.

Q. Mr. MacGregor, how long had you known Mr. Eastman prior to October 16th?

A. Oh, 24, 25 years.

Q. Had you worked with him?

A. At one time I have, yes, and then I worked right around where he worked there now—then, I mean.

Q. In October, 1952, were you familiar with his general duties? A. With what?

Q. Were you familiar with his general duties? Did you know the kind of work that he did in October, 1952?

A. Yes, he was in the mill; a mill man.

Q. Did he work in the mill, on the tracks and on cars and do various kinds of work around in the yards of the Southern Pacific Company in Eugene?

A. Well, they will assign you to a job, and they generally keep you busy.

Q. Mr. MacGregor, on October 16, 1952, did you—were you directed to go to a particular job?

A. That is right.

Q. What time did you go to work that morning?

A. Well, I reported for duty, I went into the office and reported for duty I would say about 7:45. The rest of them goes at 7:30, but, you see, I have other things to do first on the relief outfit.

Q. When you first went to work you think it was about 7:45? A. That is right.

(Testimony of Bruce MacGregor.)

Q. Where did you first go?

A. He directed me to go down on Track No. 15 to work with Mr. Barker on the dump car.

Q. You had been over to the dining car first; had you not?

A. That is right, I had to check for ice and stuff.

Q. When you got through over there from your duties as relief cook down in the dining car and came back to the office did Mr. Wood send you over to help Mr. Barker on the dump car?

A. That is right.

Q. How far in point of distance was the dump car from where you saw Mr. Wood?

A. I would say about a couple blocks, two blocks or three.

Q. So then did you walk down Track No. 15 to where this dump car was?

A. Well, I could walk down where it was, yes, not on the track.

Q. When you got down there was there more than one car on Track No. 15?

A. Well, there was more than one car—you mean on the whole track?

Q. Yes, the whole track. [94] A. Yes.

Q. How many cars were there?

A. That I don't know. I didn't count them. I just was going to the one I was assigned to.

Q. When you got there was there another car in the immediate vicinity?

A. Was there what?

Q. Was there another car besides the dump car

(Testimony of Bruce MacGregor.)

right together? A. No, there wasn't.

Q. Was there a flanger car there?

A. There was a flanger there, but it was, it was not together because you could walk in between those.

Q. How close together were they?

A. That I don't know. I didn't notice as to that. You know, you don't notice such things as that, not knowing something is going to happen.

Mr. Peterson: I ask leave of the Court, your Honor, if I might use the blackboard and have Mr. MacGregor just simply draw the location of these two cars so that we get the geographical directions straight. There has been reference to east, west, north, and south, and I do not think it is exactly clear. Is that all right, Mr. Gearin?

Mr. Gearin: I do not care; it is immaterial.

The Court: He says that the flanger was west of the dump car. [95]

The Witness: That is right.

The Court: And that a person could walk in between the two of them, but he didn't know how wide a space. I think there was other testimony that it was three or four feet between the two cars.

Mr. Peterson: Two or three feet, I think that is what the other witnesses said.

Mr. Gearin: I do not see why you need a blackboard for that, your Honor.

Mr. Peterson: I want to show the relationship of the two cars and the point of where the accident occurred so that the jury can follow which side.

(Testimony of Bruce MacGregor.)

The Court: You go ahead and draw a picture.

(Blackboard produced.)

Mr. Peterson: Q. Mr. MacGregor, if I were just simply to mark at the top of this blackboard here the direction east——

A. That is geographical you are talking about?

Q. I am just indicating the top of this would be east. A. All right.

Q. And the bottom would be west?

A. Yes.

Mr. Gearin: Why don't you put north to the top. Then nobody will get confused.

Mr. Peterson: The blackboard is rectangular, and I cannot draw the track where—— [96]

The Court: All right, east and west; proceed.

Mr. Peterson: And over here on the left, north; south on the bottom. This Track No. 15 runs in a generally easterly and a westerly direction; does it not, geographically? A. Yes, geographically.

Q. Does it run in a straight line?

A. What is it?

Q. Is it a straight track or curved?

A. Oh, well, it has got curves in it where they come in, you know. You can't come straight off of a switch.

Q. Could you tell us, is it much of a curve?

A. Well, I don't know, I couldn't tell you that. It is not an angle or like a "Y" or a turntable or anything like that, no. What you are talking about there is where the track is where the cars are?

Q. Yes.

(Testimony of Bruce MacGregor.)

A. Oh, you want where the cars are at?

Q. Yes.

A. No, there was no curve where the cars were at.

Q. In other words, then, if we just draw two lines as though they were a railroad track, these two lines here would be the railroad track?

A. Yes, sir; that is right.

Q. Now, then, there were two cars, two railroad cars sitting on the railroad tracks? [97]

A. No, there might have been more than two cars. You asked me if there was a flanger car on the other end of that track. That track is 800 feet. I don't know how many cars are on the track.

Q. I am specifically speaking of the dump car. I will start with the dump car.

A. There was one dump car.

Q. All right, starting out with one dump car, which direction was the other car from the dump car?

A. It would be west.

Q. West, so the most westerly car was the flanger car?

A. That is right.

Q. The cars extend—the flanger car extends out over the track, does it, on each side of the wheels?

A. Why, sure, I will say they did, yes.

Q. If I will just draw in here very roughly something like that that would represent one car or the flanger car sitting on the tracks?

A. Yes.

Q. Is there a platform at one end of your steps leading down off the flanger car?

A. Is there?

Q. Is there?

(Testimony of Bruce MacGregor.)

A. Sure. I don't know whether it's a platform. It is a place to get down. [98]

Q. Is it your testimony then that immediately west of this flanger car there was a dump car?

A. That is right.

Q. So if I draw another car in there something like that, that would represent the dump car?

A. Yes, yes.

Q. Is that a fair illustration of the location of the cars? A. That is right.

Q. When you arrived there was there a blue flag on either one of these cars?

A. No, not on the cars.

Q. Did you see a blue flag at all on the track?

A. Well, I don't like to work until I know there is one on because that is the first thing we were taught.

Q. I'm sorry. I move to strike his answer.

The Court: Was there a blue flag on that track?

The Witness: It is flagged, yes, sir, flagged.

Mr. Peterson: Q. Was there a blue flag?

A. I wouldn't say blue, they are red, some of them that have men that work on them.

Q. Mr. MacGregor, when you arrived at this dump car can you tell us about what time it was?

A. Oh, I reported—I would say about 7:55.

Q. That is about five minutes to eight?

A. That is right. [99]

Q. At the time that you arrived did you see Mr. Eastman in that general vicinity?

A. No, not at that time I didn't.

(Testimony of Bruce MacGregor.)

Q. At that time whom did you see?

A. I just saw A. E. Barker.

Q. Where was Mr. Barker?

A. He had put—I won't say he had because the air was already in the car when I got there. The hose was connected.

Q. My question was where was Mr. Barker?

A. He was standing at the end of the car.

Q. Which end?

A. Well, it would be the A end.

Q. East end?

A. That would be the east end; that is right.

Q. Where was the air hooked up?

A. On the pipe that runs along the track.

Q. Which end, the east end?

A. That is right.

Q. Or west end; east end?

A. That is right.

Q. Which side of the track, north or south?

A. North.

Q. So that there was air just hooked up to this dump car when you arrived? A. Yes, sir.

Q. That was hooked up to the air alongside the track? A. That is right.

Q. The air, does it not come out the end of the car, and there is a hose that runs out so that it hooks onto an air connection?

A. That is right.

Q. That is the way it was when you arrived?

A. That is right.

Q. Mr. Barker was standing on the east end;

(Testimony of Bruce MacGregor.)

is that correct? A. That is right.

Q. Now, Mr. MacGregor, after you arrived what did you do?

A. I never done nothing the whole time I was there, only walked around to the car.

Q. Walked around the car?

A. That is right.

Q. You mean to say that you walked around the car between the two cars and around it back to the same place?

A. No, I just went off around, around on the side that wouldn't dump. One side wouldn't dump.

Q. When you came from the place of Mr. Wood, that you talked to Mr. Wood, did you approach from the east or from the west?

A. Did I what?

Q. When you came to this dump car did you come down the track from the west or from the east?

A. No, I came up the A end, around the east end. [101]

Q. Around this car?

A. Yes, around where the air was.

Q. So that after you got there five minutes to eight the only thing you did was walk around the car, and that is all you did?

A. Yes, that is all I did at that time, yes, up until he swung the dump car, until he went to the dump car.

Q. About how long was it before Mr. Lambert arrived?

(Testimony of Bruce MacGregor.)

A. Well, we gave—he gave two applications on the car to dump it, and it didn't dump, and I estimate it was about maybe 20 minutes until Lambert was there. Just as soon as he could do that he came over there.

Q. Would that be then about 15 minutes after eight if you arrived five minutes after eight?

A. Maybe it would be longer than that. I didn't look at my watch. I wasn't timing myself.

Q. I understand, but I want to know if you can tell us approximately how—when Mr. Lambert arrived.

A. No, I didn't look at my watch. I don't know. You see, he just came up there, he asked if we was having difficulty.

Q. Mr. Lambert came up and asked if you were having difficulties?

A. That is right.

Q. At the time Mr. Lambert arrived where was Mr. Barker?

A. He was standing there. [102]

Q. Was that on the east end?

A. That's right, that is—

Q. Pardon me?

A. That is right.

Q. You were standing close to Mr. Barker, were you?

A. Oh, I wouldn't say I was standing close. I was standing there. I just don't know the distance.

Q. Did you at that time when Mr. Lambert arrived, did you see Mr. Eastman?

A. Just shortly after he arrived.

Q. Shortly after Mr. Lambert arrived you then saw Mr. Eastman?

A. That is right.

(Testimony of Bruce MacGregor.)

Q. Is that the first time that you had seen him?

A. That is right.

Q. Where did you see him?

A. He came there at the end of the car.

Q. He came to the end of the car. That is the east end of the car? A. Yes, sir.

Q. At that time Mr. Lambert was then present and you were present and Mr. Eastman was present, and that was all of the persons present, is that correct, at the car? A. Yes, sir.

Q. What did Mr. Lambert then do?

A. Well, he commenced to looking for the difficulty. [103]

Q. He commenced to look? A. Yes.

Q. Did he go under the car?

A. Oh, yes—you mean at this time?

Q. I will ask you, what did he do in looking?

A. He looked underneath at the parts underneath there to see if there was anything wrong in there, but he started at the other end to looking——

Q. Do I correctly follow you——

Mr. Gearin: The witness did not finish his answer.

Mr. Peterson: Are you through?

A. Yes.

Mr. Gearin: I am sorry.

Mr. Peterson: Q. Mr. MacGregor, so then do I understand you to say that Mr. Lambert went down to this end and looked at the dump car: is that correct?

(Testimony of Bruce MacGregor.)

A. Well, he didn't just go to that end. He went around the car looking.

Q. Went around the car this way? (Indicating.)

A. Yes.

Q. At the time that Mr. Lambert arrived was the air hose still hooked up? A. Yes.

Q. Did you know that, or was it while you were present that you and Mr. Barker tried to dump this car? [104] A. Was who present?

Q. When you and Mr. Barker, before Lambert arrived did you try to dump the car?

A. Yes, sir.

Q. And it would not dump?

A. That is right.

Q. So that when Mr. Lambert arrived the air hose was connected, and he looked at the car to see if he could find what was wrong with it?

A. Well, Barker went and shut the air off. He walked up and closed the air off.

Q. Was that pursuant to Mr. Lambert's instructions?

A. I was before his inspection; yes, sir.

Q. I think you misunderstood me. Was it before—did Mr. Lambert tell Mr. Barker, "Go and shut the air off?" A. No, sir, he did not.

Q. Mr. Barker just went and shut the air off?

A. Well, sure, because if a man goes under a car with the air on it is no good.

Q. Mr. MacGregor, had you seen this kind of a car in operation before, this dump car?

(Testimony of Bruce MacGregor.)

A. It were a very rare car around this vicinity. I saw one once before; yes, I did.

Q. Did you understand how it operated?

A. Well, I understood how it dumped, yes, I understood that. [105] That is, I knew the way it was supposed to function and dump, yes.

Q. Did you know if—when you went to pull the door, the side door down, when you went to dump it, in other words, you operated a lever so that it came down like that flat, and if you wanted to dump the entire contents of the car you operated another lever, and the whole car, door and car turned up sideways?

A. You didn't need no lever to dump the side door.

Q. No lever to dump the side door?

A. No.

Q. Mr. MacGregor, did Mr. Lambert go underneath the car?

A. You mean while I was there?

Q. Yes. A. Yes, sir.

Q. When Mr. Lambert went underneath the car where were you standing?

A. I was standing with Mr. Eastman.

Q. Where was that?

A. Well, I would say that was about, oh, seven feet from the track.

Q. Seven feet which way? A. South.

Q. Seven feet south of the track?

A. That is right. [106]

Q. And on the easterly end or the westerly end?

(Testimony of Bruce MacGregor.)

A. Well, it wasn't quite the middle of the car. I was just back of the wheels, the trucks, the bolsters.

Q. Just back of the wheels? A. Yes.

Q. Back, you mean west?

A. About a third back, yes.

Q. A third of the way west?

A. Back from the bolsters.

Q. From the easterly end and about seven feet out from the track? A. That is right.

Q. Is where you were standing and Mr. Eastman was standing? A. Yes, sir.

Q. Did Mr. Eastman have a tool in his hand?

A. Yes, sir.

Q. Did he have a tool in his hand?

A. Well, now, I didn't notice if he did. I don't know whether he did or whether he didn't.

Q. When Mr. Lambert was underneath the car did he have a pick handle in his hands?

A. He went and got a pick handle before he went under the car.

Q. So that when he went under the car did he have the pick handle? [107] A. Yes, sir.

Q. Did you know what Mr. Lambert was going to do with the pick handle?

A. Yes, sure, I knew what he was going to do. He went under there because he said, "There is where the difficulty is," he thought.

Q. So that you knew what Mr. Lambert was going to do? A. That is right.

Q. Did you know the condition of the locks on

(Testimony of Bruce MacGregor.)

the east end of the car and the west end of the car, of the dump car?

A. I didn't notice the one on the west end, but I noticed the one on the one he went to pry on to lift up on.

Q. Were you familiar with that car before that day? A. No, sir.

Q. Did you know whether or not there was a locking device? A. Yes, sir.

Q. On the end, on the ends of each, each end of this car and on the south side when it is in that position but up at the top of this door?

A. Yes.

Q. Did you know that? A. Yes.

Q. On that day, and there is a catch up there to catch them? A. Yes, sir. [108]

Q. Do you know what the condition of those catches were on this day?

A. No, I didn't get up there.

Q. Do you know whether or not they were open or closed then yourself?

A. I didn't know; I didn't see them.

Q. Did anyone else tell you as to whether they were open or closed? A. No.

Q. Then when you were standing there with Mr. Eastman did Mr. Lambert have his back turned towards you?

A. Yes, he had his back turned towards me, and he was working under the car.

Q. He had his back to you, and he was working under the car? A. That is right.

(Testimony of Bruce MacGregor.)

Q. What did you see Mr. Lambert do?

A. Well, when he worked under the car Mr. Eastman took about two steps with him, and he had his finger on him, and he was—he had the pick handle in there by that time, was working, had it on his shoulder and came up like that, and this dump was, well, I would say it was eccentric, it was not centered, it was sitting up on this angle or rod, and when he freed that down come the side, and when the side started down he had been under the car, he started to drop, and with the noise, you know, he kind of throwed his head up, and it come down [109] and hit him right on top of the head.

Q. Did Mr. Lambert—was he in full vision of Mr. Eastman?

A. No, I don't think he saw him.

Q. He could not see Mr. Eastman?

A. No, he had his back toward Mr. Eastman.

Q. What did you do when this door came down?

A. What did I do?

Q. Yes.

A. Well, I stood there for a second to see him laying there.

Q. Did you jump back or jump sideways?

A. I had no reasons to. I was in the clear.

Q. You were then seven feet from the track?

A. Yes, sir, just about seven feet.

Q. Mr. MacGregor, did you observe Mr. Eastman when he was on the ground?

A. Did I what?

Q. Did you see him when he was there?

(Testimony of Bruce MacGregor.)

A. Yes, sir, I did.

Q. Sitting or——?

A. Well, it just knocked him kind of down, and I stood there for a minute and watched him. I didn't know what to do. It scared me. It was the first time in all my years I had ever been around an accident like that. And he rolled over and goes to get up, and he had his hat, his hat was laying there in the dirt. I put my hand down on him, on his shoulder, but [110] I didn't help him. He raised up, put his hat on, never said a word to me, and walked over to a flatcar and leaned up against it. I never heard him say a word after it hit him.

Q. Did you see a tool in his hand?

A. No, I did not.

Q. If he had had it, do you know which hand he used to put his hat on, his cap?

A. No, I didn't notice that.

Q. Did he appear to you to be conscious at that time? A. What?

Q. Did Mr. Eastman appear to you to be conscious at that time?

A. Well, he didn't talk. He looked all right. He took his hat off like he always did. He had a habit of scratching his head.

Q. Did he say anything to you?

A. No, he never said a word. I never heard him say a word.

Q. Did you hear him say anything to anyone else? A. What?

Q. Did you hear him say anything to anyone else

(Testimony of Bruce MacGregor.)

at that time? A. No, I didn't.

Q. Did you hear him say anything to Mr. Lambert at that time?

A. No, I heard Mr. Lambert tell him to come on, that he had to go to the hospital.

Q. Did you hear Mr. Eastman say anything?

A. No, they walked away then.

Q. As they walked away do you recall seeing a tool in the hand of Mr. Eastman?

A. No, I didn't see nothing.

Q. A hammer or other tool?

A. No, I saw nothing in his hand.

Q. Mr. MacGregor, during the years that you worked with Ole Eastman was he a good workman? A. Was he a good workman?

Q. Yes.

A. Why, certainly, he was a good workman.

Q. What was the general condition of his health?

A. That I don't know.

Q. Did he appear to be strong and robust?

A. Well, that I couldn't determine. I am not no doctor.

Q. I understand, but did he seem to be healthy to you?

A. Well, he worked. That is all I can say. I don't know about his health. He may have had a heart ailment, cancer, or something. I don't know nothing about that.

Q. Did he work all the time?

A. Well, I don't know, lots of times I am not there, and I couldn't say if he was working then.

(Testimony of Bruce MacGregor.)

Do you mean was he working all the time through the day?

Q. I meant to say was he doing heavy work, heavy manual work, where you have to be healthy?

The Court: Did he look to you like a healthy man?

The Witness: Well, you know, he was a thin man, but you can't tell about a man whether he is thin or not. I don't know about his health. He looked all right to me, yes.

Mr. Peterson: No further questions.

Cross Examination

By Mr. Gearin:

Q. You say that you are on the relief train? Does that relief train go out on anything other than emergencies?

A. Yes, we go out on derailments, slides, and all that.

Q. How often does that happen?

A. Sometimes quite often and sometimes you don't go for a long time.

Q. Is the majority, the major portion of your time spent in connection with the relief train?

A. No, not all.

Q. When you were standing in the clear there with Mr. Eastman before Mr. Lambert went under the car was there anything said to Mr. Eastman about his standing close by there or being in the vicinity?

A. Well, when I went on the other side of the

(Testimony of Bruce MacGregor.)

car I told him to keep in the clear. I was afraid, you know, and this car being only able to dump on one side I wasn't afraid on that side. If it had dumped on both sides then you would have to dump on both sides, but this car could only dump [113] one way.

Mr. Gearin: That is all. I have nothing further.

Redirect Examination

By Mr. Peterson:

Q. Mr. MacGregor, did I understand you to say that when you went around on the other side of the car you, that you told Mr. Eastman to do what?

A. To keep in the clear.

Q. To keep in the clear? A. Yes.

Q. Now, then, did you yourself recognize that this was a dangerous operation?

Mr. Gearin: Object to the form of the question.

The Court: Objection overruled. Proceed.

The Witness: Any car work is dangerous. It is hazardous, any of it. I don't care what it is, you have got them jacked up in the air there with an air jack, and you are underneath there with an air hammer, it is all hazardous.

Q. About how much did this door weigh?

A. That is pretty hard—I would say it weighed——

Mr. Gearin: If you know.

The Witness: ——weighed over a ton.

Mr. Peterson: Over a ton?

A. You know, it is pretty hard to judge even.

(Testimony of Bruce MacGregor.)

Q. What would be your best estimate? [114]

A. How much would I say?

Q. Yes.

A. Ton and a half. Now I am just guessing.

Q. Mr. MacGregor, when that door came down, can you tell the jury the interval of time that it took? You understand my question?

A. No, I do not.

Q. Can you tell and can you estimate the time that it took for the door to come down from an upright position to the point that it was afterwards? A. No, sir.

Q. Would you say that it was as fast as the snap of my finger? (Snaps fingers.)

A. Well, it was bigger than your finger so it might—it would take longer than that because there was a noise. He heard the noise and throwed his head up and he, Jerry, started to, I will say duck down.

Q. Can you estimate that in point of time, in seconds?

A. Yes, it would be, it wouldn't be a minute or not over a minute.

Q. It would not be a minute? You mean 60 seconds?

A. It would not be very long, no. Well, the minute he pushed up and it just come down, that is all, but I can't determine the time, no.

Q. By snapping my fingers, that would be too fast a time? [115]

The Court: Well, it was quite fast anyway.

(Testimony of Bruce MacGregor.)

The Witness: It was fast, yes.

The Court: Did Mr. Eastman know that Mr. Lambert was under the car?

The Witness: Yes, he pushed under after him, he pushed toward him after him, had his finger out pointing to something where he went.

The Court: Was he working on that car?

The Witness: Well, he was not working on it. I don't know whether he was sent there to work or not because I don't assign them.

The Court: That is all.

Mr. Peterson: Q. Mr. MacGregor, when Mr. Lambert turned to get under the car were you standing side by side with Ole Eastman?

A. Well, he may have been a little bit ahead of me, not much, just right here. (Indicating.) I could have touched him with my hand going this way but not going towards the car. That would be west.

Q. Can you tell what Mr. Eastman was pointing at? A. What he was pointing at?

Q. Yes.

A. Well, now, that I can't tell. I can state that he was pointing. He was pointing the same direction in which Mr. Lambert was going.

Q. Did Mr. Eastman say, utter any word or words? [116] A. No, he did not.

Mr. Peterson: You may take the witness.

Mr. Gearin: I have nothing further. May the witness be excused, your Honor?

The Court: You're excused.

Mr. Sahlstrom: I would like to have the wit-

ness stay, your Honor, until the close of the trial.

The Court: Very well. You stay for a while.

KENNETH SUTTON

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, Mr. Sutton.

A. Kenneth Earl Sutton.

Q. What is your address?

A. 1528 North Springfield.

Q. On October 16, 1952, what were your official duties?

A. I was Deputy Coroner of Lane County.

Q. Where were you employed in addition to that?

A. The Coroner's office is located on Springfield, at Bartholomew-Buell Chapel. It is a funeral home.

Q. Your services also include working for the funeral home? A. That is correct.

Q. To the best of your recollection, when did you first receive notice as the Deputy Coroner of the accident that occurred on October 16, 1952?

A. I think it was the afternoon of the day following.

Q. How was it brought to your attention?

A. I beg your pardon?

Q. How was it brought to your attention?

(Testimony of Kenneth Sutton.)

A. Well, the hospital called, and Mr. Blatchley was on duty, and, of course, he immediately informed me, and I started [118] making investigation.

Q. That was the routine, that if a death occurred that your office should be notified; is that right?

A. Well, the Coroner's office investigates every death other than natural ones. That is the duty of the Coroner's office.

Q. Tell the jury what you did then after you received this notice of the death of Mr. Eastman?

A. Well, I immediately proceeded to the Southern Pacific Shops, and there I contacted Mr. Wood who, I believe, was the car foreman, and I don't recall exactly—of course, the first thing we do is we went to find the witnesses, you know, to the accident, and I——

Mr. Gearin: I am going to object to the materiality of all this, your Honor.

The Court: What is the purpose of this testimony?

Mr. Sahlstrom: To indicate, your Honor, what he did in connection with the investigation in determining certain facts from the witness MacGregor.

The Court: MacGregor?

Mr. Sahlstrom: Yes.

The Court: Are you trying to impeach MacGregor?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Kenneth Sutton.)

The Court: You called Mr. MacGregor. Then you are trying to impeach him?

Mr. Sahlstrom: We called him as an adverse party, your Honor. [119]

The Court: You did not give him any impeaching questions.

Mr. Sahlstrom: May it please the Court, we have laid foundation for an impeaching question in relation to Mr. MacGregor's statement that at the time of the accident the door came down as Eastman walked forward. We are going to show prior inconsistent statement.

Mr. Gearin: Just a moment, your Honor. They have laid no basis. I object to counsel's making statements in front of the jury unless they are directed to the witness.

The Court: This is not substantive evidence.

Mr. Sahlstrom: It is a prior inconsistent statement of the witness, your Honor, MacGregor.

The Court: Just solely for the purpose of impeaching the witness MacGregor?

Mr. Sahlstrom: Yes, your Honor.

The Court: You are trying to discredit his testimony?

Mr. Sahlstrom: We are trying to show that at a previous time he made a different inconsistent statement which is material to our case, your Honor.

Mr. Gearin: He did not lay a foundation when the witness was on the stand.

The Court: You are not contending this is substantive evidence then?

(Testimony of Kenneth Sutton.)

Mr. Sahlstrom: I believe it would constitute substantive evidence, your Honor. [120]

The Court: Since when was Mr. MacGregor authorized by the Southern Pacific Company to make statements on its behalf.

Mr. Sahlstrom: Only as an employee and agent, your Honor. Our point is that he made a different statement entirely about the accident.

The Court: I am going to let you withdraw Mr. Sutton and put Mr. MacGregor back on and lay a foundation and then use Mr. Sutton solely for the purpose of impeachment and not for the purpose of any substantive evidence.

(Witness Sutton temporarily withdrawn.)

BRUCE MacGREGOR

recalled, testified as follows:

Examination

By Mr. Sahlstrom:

Q. Mr. MacGregor, did you have a conversation with Deputy Coroner Kenneth Sutton on the day following this accident?

A. That is right, I made a statement.

Q. Did you have occasion at that time to go with Mr. Lambert and Mr. Sutton to the scene of this accident to show Mr. Sutton the dump car?

A. It was right by the dump car where I talked to him.

Q. At that particular time did you have a con-

(Testimony of Bruce MacGregor.)

versation with Mr. Sutton about how this accident happened?

A. Well, yes, he asked me.

Q. As a matter of fact, he asked you questions about the accident in connection with a report, didn't he?

The Court: I did not hear.

Mr. Sahlstrom: Q. He asked you questions about this accident, as to how it had occurred?

A. They introduced me to him and told me that is what he came here for. I asked him if he was the Coroner. He knew the Coroner well. He says that the Coroner had sent him there. Maybe I should not have done it. I never seen a paper or nothing. He stood there and wrote. Then he walked away.

The Court: Nobody is concerned about that. They just want to ask you about that conversation. There is nothing [122] improper about talking to Mr. Sutton. Proceed.

Mr. Sahlstrom: Q. Did you make the following statement to Mr. Kenneth Sutton, the statement as follows: That you and Mr. Eastman were standing side by side when Mr. Lambert went under the dump car and manipulated the dumping arm that caused the door to come down, and at that time when the door came down you stepped back and got out of the way, and Mr. Eastman did not make it?

A. If I would have said that——

Q. Did you make that statement?

The Court: Did you make that statement?

The Witness: No.

(Testimony of Bruce MacGregor.)

The Court: What did you tell him?

The Witness: I told him that Mr. Eastman walked and that there was two movements made, Eastman going towards Lambert and Lambert ducking down, but I never moved. I didn't have an opportunity.

Q. Didn't you tell him Mr. Lambert was under the car at that time? A. Sir?

Q. Did you tell Mr. Sutton that Mr. Lambert was under the car at the time of the accident?

A. Well, I think I did. I told him how it happened, yes.

Q. That is where he was; isn't that correct?

A. Yes; that is right. [123]

Q. You told him that Mr. Eastman took a step forward or two steps forward?

A. Well, I said one or two steps forward, yes.

Q. As the door came down?

A. No, before it came down.

Q. Before it came down?

A. He wouldn't have time to take two steps when the door came down.

Q. Before the door came down and he was standing there, standing still when the door came down; is that right?

A. Yes, he was standing still.

Q. Did you make any warning to Mr. Eastman at that time.

A. I didn't have time. He heard the noise, and that startled him.

Q. When Mr. Eastman walked forward, accord-

(Testimony of Bruce MacGregor.)

ing to your testimony, did you make any warning to him at that time?

A. I didn't have time. In fact, I was watching Lambert under there. I looked around, and here was Otto going there.

Q. Did you yourself step backward at that time?

A. No, I did not.

Q. Do you deny that you made that statement to Mr. Sutton?

A. I never did that. He may have misunderstood. It was outside there, switch engines and things around there. There was noise.

Mr. Sahlstrom: No further questions. That is all.

Mr. Gearin: I have nothing further, your Honor.

KENNETH SUTTON

recalled, testified as follows:

Direct Examination (Continued)

By Mr. Sahlstrom:

Mr. Sutton, you have heard the testimony here of Mr. MacGregor; have you not?

A. Yes, sir, I have.

Q. I will ask you whether Mr. MacGregor stated to you in your investigation that he and Mr. Eastman——

Mr. Gearin: This is leading.

The Court: You ask him what he said.

Mr. Sahlstrom: Q. Then I will just ask you specifically what did Mr. MacGregor tell you at that

(Testimony of Kenneth Sutton.)

time about where he was standing and where Mr. Eastman was standing?

A. The way I understand it, the way it was told to me by MacGregor, Eastman had gotten down off of this flanger car and walked around to where MacGregor was standing, and they were talking there, and in the meantime while they were standing there Lambert had walked or crawled back under the car for the purpose, I assume, of releasing these dogs or whatever it was that he was going to do under the car, and it was while they were standing together that this door or the side of this car came down, and I am sure that MacGregor said he jumped back out of the way. There was nothing ever said, to my knowledge, about him walking back under the car or walking towards the car, to the best of my recollection. [125]

Q. You never heard Mr. MacGregor say that Mr. Eastman walked forward?

A. I never heard that, no.

Q. Did he make any statement to the effect that he got away but Mr. Eastman did not?

Mr. Gearin: That is leading. He has already related what he was supposed to have said.

The Court: All right, proceed. Did he make that statement?

The Witness: I can't be sure of that, your Honor.

Mr. Sahlstrom: Q. Well, words to that effect?

A. Well, I seem to have the impression. This whole thing is more or less of an impression to me because it has happened sometime ago, and I have

(Testimony of Kenneth Sutton.)

to kind of think back to the thing, you see. I think I do have my report I could refer to, but it is not too specific.

Mr. Sahlstrom: Is that portion of what Mr. MacGregor told you at that particular time clear to you?

Mr. Gearin: Just a moment, your Honor, I think that is an improper question. I object to the form. He has stated it was just his impression; is that correct, Mr. Sutton?

The Witness: I did not hear you.

The Court: I will sustain the objection.

Mr. Sahlstrom: No further questions. [126]

Cross Examination

By Mr. Gearin:

Q. Mr. Sutton, the testimony that you have just given us relating to a conversation you had with Mr. MacGregor is an impression that you had from being out there talking to him in a noisy freight yard, isn't it?

A. Well, I do not quite know how to answer that question. We are not—we talked, and everything was perfectly clear as far as that goes, and I have the impressions of all of these cases that I have investigated. This one is—naturally, I have a picture of everything that has been on these cases, and this is the picture I am trying to bring out now.

Mr. Gearin: Your Honor, at this time I move

(Testimony of Kenneth Sutton.)

to strike the testimony of Mr. Sutton and ask that the jury be instructed to disregard it.

The Court: Do you recall a statement of Mr. MacGregor to the effect that he had to jump back, or is that just an impression that you have?

The Witness: Well, I am sure that he made that statement.

The Court: Did you make any notes of that statement?

The Witness: No, I did not.

The Court: Did you make any notes of your conversation while you were at the yard?

The Witness: Well, I have my report. Shall I refer to that, your Honor? [127]

The Court: Yes, you may refer to your report.

The Witness: To see if there is in there anything that would help.

The Court: Does your report say anything about him jumping back?

The Witness: That is not here, no. That is not on this report.

Mr. Gearin: May I direct another question to the witness?

The Court: Go ahead.

Mr. Gearin: Q. If you will refer to your report that you have there where it says "Form Coroner 3," on the top, "143-C; Name of Informant, Mr. Woods—Car Foreman," does it not?

A. That's right.

Mr. Gearin: I would like to have the Coroner's report received in evidence, your Honor. It is at-

(Testimony of Kenneth Sutton.)

tached to his deposition as an exhibit which is listed and given a number as pre-trial exhibit. I will stipulate, your Honor, that the photostatic copy attached to the original deposition may be used in lieu of the original.

The Court: Any objection?

Mr. Sahlstrom: No objection.

(Photostatic copy of Coroner's report previously marked Exhibit 3 for identification was received in evidence.)

The Court: Is that all? [128]

Mr. Gearin: I have nothing further, your Honor.

The Court: Any redirect?

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Sutton, in carrying out this investigation which employees did you have your conversations with? A. Which employees?

Q. Yes.

A. I first contacted Mr. Woods, I am sure, and then we went out to locate these other two fellows which were Lambert and MacGregor, I am sure.

Q. Did you go out there to the train yards where the dump car was at that time located?

A. Yes.

Q. Did they point out to you at that time the particular car and the various portions of mechanism? A. Yes, they did.

The Court: There is no dispute about that. This

(Testimony of Kenneth Sutton.)

is not proper redirect. Ask him any questions you want to about the conversation.

Mr. Sahlstrom: Q. I would like to ask you if you will recall now as best you can as to the specific conversation that you had with Mr. MacGregor as to the position that he was standing and the position that Mr. Eastman was standing, the conversation itself rather than your impression. Will you do that? Tell us in your own words what you recall as having [129] been said by Mr. MacGregor at that time.

A. Well, that is kind of hard to do over a period of time thinking back exactly what was said, but I still have this idea in my mind, and if I was rewriting this report I would state that very definitely, that they were standing talking together, and that Eastman had just gotten down off of this flanger car and walked around to talk to MacGregor, they were both standing together. No mention was made of him walking under the car.

Q. What specifically, to the best of your recollection, was said by Mr. MacGregor as to his having gotten out of the way or words of that effect?

A. Well, it is like I said. I can't remember the exact words, but I still have the picture in my mind that he had to get out of the way.

Q. That is the conversation that you are referring to with Mr. MacGregor?

A. A conversation, I can't recall the words, no, sir, but an idea so that they were both standing there together, and he had to get back out of the

(Testimony of Kenneth Sutton.)

way. You see, that is what I mean by it. The conversation would be hard for me to recall.

Q. We do not expect you to remember exact words, but that is your best recollection of what was said? A. Yes.

Mr. Sahlstrom: I think we might have this death record introduced by this witness. [130]

(Document referred to marked Plaintiff's Exhibit Number 2 for identification.)

The Court: Is there any question about the fact that Mr. Eastman died?

Mr. Gearin: No, it is admitted that he died.

The Court: What is the purpose of this exhibit?

Mr. Sahlstrom: A report of his death.

Mr. Gearin: It is admitted he died.

The Court: Objection sustained.

(Exhibit rejected.)

Mr. Sahlstrom: No further questions. [131]

ROBERT J. MARTENS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Robert J. Martens?

A. Correct.

Q. How old are you, Mr. Martens?

A. Forty-nine the second day of March.

Q. Are you married? A. Yes, sir.

Q. Where do you live?

(Testimony of Robert J. Martens.)

A. 952 West Sixth Avenue, Eugene, Oregon.

Q. What is your present employment?

A. Car inspector of Southern Pacific Company.

Q. How long have you been employed by Southern Pacific Company?

A. Seventeen years, 11th day of November, 1937.

Q. Mr. Martens, have you been continuously employed in Eugene, Oregon, for the Southern Pacific Company?

A. Yes, sir.

Q. Are you familiar with a dump car that is commonly known as a Clark type western dump car?

A. I have some knowledge of it, yes, sir.

Q. I wonder if the witness might be shown the pictures and [132] I approach the witness, if I may, your Honor, and handing you what has been marked Plaintiff's Exhibit 2-A I will ask you that you hold it up so that the jury might see what we are referring to. Hold it up so that the jury might see, in this fashion with your left hand. Is that a side view of a Clark type dump car?

A. Yes, sir.

Q. In your job as a car repairman——

Mr. Gearin: Inspector, he said.

Mr. Peterson: ——Inspector, have you inspected that type of dump car?

A. I have inspected that type and all other types of passenger and freight equipment.

Q. Have you yourself repaired that type of dump car?

A. Years ago I have, yes, made repairs to them.

(Testimony of Robert J. Martens.)

Q. Mr. Martens, would you tell the jury what is the significance of the blue flag rule, the blue flag safety rule?

Mr. Gearin: Objected to on the ground of competency, your Honor. It speaks for itself.

The Court: We are going to hear it. Go ahead. Is that to tell people that the car is being worked on?

The Witness: Yes, sir, that is one of the requirements, and it is mandatory under the Interstate Commerce Commission and the transportation Rule 26 of the Southern Pacific Company, and it is also Rule 48 of the Motor Vehicle and Car Department [133] agreement which is negotiated between the labor organizations and Southern Pacific Company. That is mandatory.

The Court: Proceed.

Mr. Peterson: Q. Is that a safety rule designed for safety of railroad workmen?

A. That is the primary purpose.

Mr. Peterson: May we have this marked?

The Court: What is that for?

Mr. Peterson: To introduce in evidence as Rule 48, your Honor.

Mr. Gearin: May I suggest that the union contract go in if the witness reads the rule into the record. I do not think the rule is material, a contract of labor is material to this proceeding.

The Court: I am just letting him make his record at this point. I am not submitting it to the

(Testimony of Robert J. Martens.)

jury. I think it is absolutely immaterial myself. I am merely making the record.

The Witness: Do you wish me to read it, your Honor?

The Court: Go ahead.

The Witness: It is under caption: Protection of Employees, Rule 49, and you drop down to paragraph E:

“Employees required to work under cars or locomotives will protect themselves with proper signals. When the nature of the work to be done requires, locomotives and passenger [134] train cars will be placed over a pit if available.

F. “Trains or cars while being inspected or worked on by train yard employees, will be protected by blue flag by day and blue light by night, which will not be removed, except by the workmen placing same.”

Same thing as Transportation Department Rule 2031. That refers to the Southern Pacific Company Transportation Rule 26.

Q. Mr. Martens, what is the usual and customary method of repairing or putting in operation of a dump car of the type involved here when the arm is inoperative so that the door will not come down?

A. Well, the first requirement of any employee before going to work on or about cars is to know that the car, track or locomotive have the proper signals displayed which has just been read to you, a blue flag by day and a blue light by night, and we

(Testimony of Robert J. Martens.)

note that in Transportation Rule 26 which requires that the tracks be locked for the protection of the employees.

That takes care of your general practice in the operation before repairs are made to either engines, locomotives on repair tracks and in the roundhouse. The next step then would be in this particular case, in which I worked on the repair track from 1937 to 1941 and repaired cars of the K and J type which is also a dump car, we used small standees something like a railroad sign which said, "Danger, keep out." They were all placed four corners beyond the car to keep that place restricted from the area in which those cars may be dumped.

Q. Mr. Martens, are there locking mechanisms on this kind of a dump car?

A. There are, yes, sir.

Q. So that the door cannot come down?

A. Yes, sir, that is right, the top at each end of the car on each side.

Q. What is the usual and customary method in respect to those if you are going to manipulate the mechanism that would cause the door to drop when there are other workmen about?

A. You mean the air mechanism before I do that?

Q. Yes.

A. I would see that these locks are in proper place secured because if you didn't I would jeopardize myself or any other repairman or other employees if I failed to do that.

(Testimony of Robert J. Martens.)

Q. If the mechanism, locking mechanism is on—if one is burned off one end and the other is in an open position, is the door, is it in such condition that it could come down?

A. It is free by the force of gravity to drop.

Q. If the locking mechanism on each end of the car were not burned off but were actually there and the other one were actually there on the opposite end, and if they were locked or [136] in a closed position, could the door come down?

A. Not if they were in proper position the door couldn't come down.

Q. Mr. Martens, do you know where the mill room is in relation to Track No. 15?

A. It is just outside the shed or adjacent to the repair track 18-19, I would say, is on the north side and on the south side of Track 15.

Q. Mr. Martens, were you over to Track No. 15 to look at the dump car No. MW3372 on the night of October 16, 1952?

A. After I had completed my duty of assignment, I proceeded to the repair track to look at this particular car.

Q. When you arrived that evening was it after dark?

A. Yes, sir, sometime after 11:00 p.m.

Q. Would you tell the jury whether or not those pictures accurately portray what you yourself saw on that evening?

Mr. Gearin: There is no question about that, your Honor. They are in evidence already.

(Testimony of Robert J. Martens.)

The Court: That has been answered already. It has been admitted that the pictures accurately portray the conditions as they existed at the time of the accident.

Mr. Peterson: Your Honor, if counsel so admits that I will not ask the witness any further questions.

The Court: That would be the only basis upon which they could have been admitted in evidence.

Mr. Peterson: Mr. Martens, does one of those pictures show the car coupled together to the flanger car?

A. Yes, this picture here that I have definitely shows that the flanger and the S.P. and S. MW3372 are coupled together through the coupler mechanisms.

The Court: The fact that they are coupled together the night after does not mean that they were coupled together the day previous, and there is no presumption of that and no inference can be drawn from that picture. The jury is instructed to disregard that statement. Proceed.

Mr. Peterson: Q. Mr. Martens, is it good railway practice in railroad practice and repair of a bad order dump car to manipulate an arm in such a way that the door can come down when there are workmen in the immediate vicinity?

Mr. Gearin: That invades the province of the jury, your Honor. The witness is not qualified; calls for a conclusion.

The Court: I do not think there are sufficient

(Testimony of Robert J. Martens.)

facts in the first place to sustain an objection on that ground. This car, the testimony was, could not have been—the locks could not work because the door was partially down. That is the testimony. That is Lambert's testimony, that you could not lock that car, and this was not a car in perfect condition. This was a car that needed repairs.

Mr. Peterson: I will rephrase the question.

Q. Mr. Martens, assume that on this car which you have a [138] picture on one end the lock on that type of car was burned off, and the other lock was in an open position. Would it be good railroad practice under those circumstances to manipulate the operating mechanism of the arm underneath when there are workmen in the range of a falling door?

Mr. Gearin: Objection, your Honor. There is no testimony in the record that at that time there were any men within range. They were all in a safe place at that time, and for the same grounds as assigned to the last question.

The Court: Objection sustained.

Mr. Peterson: Q. Mr. Martens, what is the significance of air being in a car? Why is it—how is air used in the operation of this device?

A. Well, it is a source of power to operate the mechanism of both the pistons beneath the car and on the side. It is your only source of power.

Q. When that power is, when it is hooked up, how is the motive power used? How is it turned on?

A. It is used by a control valve on the end of the car to be operated from either side of the car across

(Testimony of Robert J. Martens.)

your coupler which is maintained in the center of the car, but if you want to tip one direction, why, you would raise the lever up out of the safety device and then move it over, place it in the other one in order to tip that way, and, of course, if you wanted to reverse direction you would do the opposite; you [139] would move to the left.

Q. Mr. Martens, there has been some reference to a piston on each end of this dump car. I wonder if you would hold it up so that the jury knows what I am going to ask you. Now, is that the piston that is located on the end of this dump car?

A. That is correct.

Q. Would you point out the piston?

A. Right here. (Indicating.)

Q. If you intend to dump that car door to the south what do you do with the piston?

A. I will have to assume this is the side.

Q. All right.

A. That piston would be placed in that position so as it would operate out this way. (Indicating.)

Q. How is that piston placed in that position?

A. By a pin.

Q. When it is placed in that position and you intend to dump it there does that person have to disconnect this locking mechanism that is on the top?

A. This one here on the top would be operated by hand.

Q. I am not sure that the jury sees what I am

(Testimony of Robert J. Martens.)

asking you. Is the locking mechanism on the top of this car, is it manually operated, by hand?

A. It can be operated manually, but you have this rod coming over that would operate it by air.

Q. So that if a person wanted to dump to the south he would [140] move this piston over in that position and then use air on it?

A. That would be the source of your power, sir.

Q. If you wanted to lock this, keep this door from opening, what would you do with this lock up at the top?

A. See that it is properly secured; then move your cylinder.

Q. I did not hear you.

A. It should be properly locked, and then move your piston. It would be automatic in there, but you would have to see that it was secured.

Mr. Peterson: You make take the witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Martens, why did you go out there after your tour of duty to look at this car?

A. Mr. Eastman was one of the first employees I worked with on the 11th day of September, 1937. I had been in very close connection with Ed. I would say he was a very intimate friend of mine, and when I heard of the accident I proceeded over to the repair track in order to take a look at the type of car. And, then, of course, I had known that night he died.

(Testimony of Robert J. Martens.)

Q. You went over there because of your friendship for the deceased? A. That is right.

Q. Mr. Sahlstrom is your personal attorney; is he not? Isn't he your attorney? [141]

A. In what manner? I have had two or three attorneys, sir.

Q. He has been one of them?

A. Mr. Sahlstrom has acted as counsel for me; yes, sir.

Q. Your testimony with regard to this type of car, is that based upon all types of dump cars or upon your inspection and examination and working with this particular type of dump car that was here involved?

A. Your Honor, I just don't quite understand.

The Court: Repeat the question.

Mr. Gearin: I will rephrase the question.

Q. Your testimony about the working of these dump cars, is that based upon all types of dump cars, or is it based upon the Clark type?

A. That is a Clark type, sir.

Q. How many of them have you seen?

A. Clark types?

Q. Yes, sir.

A. When I first started railroading, sir, I used to see them quite frequently. In the last 20 years that is the first one I have seen.

Q. That was the first one you had seen in 20 years? A. Yes, sir.

Mr. Gearin: That is all. [142]

(Testimony of Robert J. Martens.)

Redirect Examination

By Mr. Peterson:

Q. What was the condition of health of Mr. Eastman prior to October 16, 1952, as you observed it?

A. What did you say? I did not hear.

Q. What was his condition of health?

A. I would say he was in good health.

Q. One further question concerning the car itself. If the air hose had been hooked up, this car, the air hose was hooked to a connection so it could get air into it and operate a couple times and then disconnect it, would there still be motive power in the car or some part of it so as to—when this piston is put into position that the air motive power functions?

A. It would depend upon a control valve like that. You have—if the air had been connected to it that air could leak through the reservoir to the control valve. It is possible, yes, sir.

Mr. Peterson: No further questions.

Mr. Gearin: That is all.

(Witness excused.) [143]

TERESA EASTMAN

called in her own behalf and in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please. State your name

(Testimony of Teresa Eastman.)

for the jury, please. A. Teresa Eastman.

Q. What is your address, Mrs. Eastman?

A. 708 West Fourth, Eugene.

Q. What city? A. Eugene.

Q. How long have you lived at that address in Eugene?

A. This is starting the 28th year. In March it will be 28 years.

Q. Where were you born?

A. I was born at Sulpher Springs. It is a small place about 20 miles from Gardiner in Oregon.

Q. In Douglas County?

A. In Douglas County.

Q. At the time of the accident on October 16, 1952, how old were you? A. In 1952?

Q. Yes. A. I was 61 years old. [144]

Q. At this time how old are you?

A. I am 63 the 4th of April.

Q. What is your birth date?

A. The 4th of April, 1954, I was 63.

Q. Had you been married prior to having married Mr. Eastman? A. Yes.

Q. To whom? A. To Louis J. Kolker.

Q. When did Mr. Kolker pass away?

A. In 1946.

Q. What business was he in in Eugene?

A. He passed away on the 19th of August, 1946.

The Court: What was his business during his lifetime?

The Witness: He was in the grocery business.

(Testimony of Teresa Eastman.)

Mr. Sahlstrom: Q. You made your home in Eugene?

A. And he also worked in a hardware store in Eugene for years before I met him.

Q. Do you have some difficulty in hearing, Mrs. Eastman? A. What is it?

Q. Do you have some difficulty in hearing?

A. Yes, I do. My right ear I don't hear well out of.

The Court: Why don't you ask leading questions. This does not involve liability?

Mr. Gearin: I have no objection.

The Court: Proceed. [145]

Mr. Sahlstrom: Q. What is the condition of your eyesight at this time?

A. I use one eye, my right eye.

The Court: I do not think that is material. You had better confine yourself to the issues involved in this case.

Mr. Sahlstrom: Q. What date were you married to Eric Gunner Eastman?

A. On October 25, 1949.

Q. Where? A. In Eugene, Oregon.

Q. At the time of Mr. Eastman's death how old was he?

A. He was 57. He would have been 58 had he lived until December that year. December 26th was his birthday.

Q. You and Mr. Eastman made your home at 708 West Fourth, in Eugene, is that right?

A. What is it?

(Testimony of Teresa Eastman.)

Q. You made your home at 708 West Fourth in Eugene; is that right? A. Yes.

Q. Do you own that house? A. Yes.

Q. Approximately how much were Mr. Eastman's earnings while employed by Southern Pacific Company?

A. Well, it was around either 300 or more.

Q. Each month? [146] A. Yes.

Mr. Gearin: Mr. Sahlstrom, I will stipulate to that, that whatever is shown on his income tax returns I will stipulate he earned through the company.

Mr. Sahlstrom: In the year 1951 the return shows he earned for Southern Pacific Company the sum of \$3762.13, and up until the time of his death in October 16, 1952, he earned a total sum of \$3025.83.

The Court: About \$300 a month.

Mr. Sahlstrom: Q. Do you have some income from the teaching of piano lessons?

A. What is it?

The Court: That is immaterial.

Did your husband support you?

The Witness: Yes, he did.

The Court: He supported you?

The Witness: Yes, he did.

The Court: And he was the type of man who saved his money and brought home his check?

The Witness: He brought his check home and paid the bills, all the household bills.

The Court: He was a good husband?

(Testimony of Teresa Eastman.)

The Witness: Yes, he was.

Mr. Sahlstrom: Q. Did he spend all of his pay check for the family expenses? [147]

A. For anything around the house and anything that was needed.

Q. Did he also spend some money for the repairing and alteration of his house?

A. Yes, he did, he had the whole house redecorated, new light fixtures, everything put in.

Q. Do you know how much that cost, approximately? A. What is it?

Q. How much did that cost, do you know, approximately?

A. What he paid for the redecorating the house?

Q. Yes.

A. \$350, when we were first married.

Q. Was all the money that he brought home from his pay check every month spent for your family expenses?

A. He paid all family expenses.

Q. When did you first receive notice of the accident in which your husband met his death?

Mr. Gearin: That is immaterial, your Honor.

The Witness: Five minutes after 12 on October 16th.

Q. Did you then go to the Eugene Hospital Clinic where he was being cared for?

A. I had a girl in the house that was gone to the store so I know exactly what time it was because she was going to have lunch with me before we heard of the accident.

(Testimony of Teresa Eastman.)

The Court: What is the purpose of this examination?

Mr. Sahlstrom: To show when he was received, 12:15, he [148] was unconscious, your Honor.

The Witness: She came back and had a car, took me from there to the hospital.

The Court: Whose pain and suffering?

Mr. Sahlstrom: Eric Eastman's.

The Court: If a man is unconscious it is pretty hard to have pain.

Mr. Sahlstrom: We are showing so far that he left the SP yards about 10:30.

The Court: The testimony is that he was unconscious when she arrived shortly after 12:00.

Mr. Gearin: We will so stipulate, your Honor.

Mr. Sahlstrom: Did he ever regain consciousness while you were there at the hospital? A. No.

Q. Did you remain with him until his death?

A. I did.

Q. What time did death occur?

A. At 11:00 o'clock at night he died.

Mr. Sahlstrom: Your witness.

Mr. Gearin: I have no questions.

The Court: That is all, Mrs. Eastman.

(Witness excused.)

Mr. Sahlstrom: We have one or two more exhibits, your Honor. We would like to offer his honorable discharge showing [149] he was a railroad man from 1918 on.

Mr. Gearin: It is immaterial.

Mr. Sahlstrom: A copy of letters of administration showing her authority.

Mr. Gearin: It is admitted. We admit that she is the administratrix, your Honor. I do not think it is necessary to have that in the record.

The Court: Has that not been admitted in the pre-trial order?

Mr. Gearin: Yes, your Honor.

The Court: In paragraph 3 it is admitted.

Mr. Sahlstrom: Those are all the exhibits, your Honor—excuse me, there is one more exhibit, the Basic Safety Code of the State of Oregon.

Mr. Gearin: It is immaterial as not having any applicability to the facts of this case.

Mr. Sahlstrom: We contend it does. We have placed in the pre-trial order the particular provision we rely upon.

The Court: We will admit that. All the others are rejected.

(Booklet, Basic Safety Code of the State of Oregon, previously marked Plaintiff's Exhibit Number 4 for identification was received in evidence.)

The Court: Does the plaintiff rest?

Mr. Sahlstrom: Yes. [150]

Mr. Gearin: Defendant rests.

The Court: Ladies and gentlemen of the jury, we will take a recess now. Please return at 10:00 o'clock on Tuesday morning. In the meantime, please do not discuss this case with anyone else. Please do not discuss this case with anyone. You

are now excused until 10:00 o'clock Tuesday morning.

(Jury retires.)

Mr. Gearin: At this time, if the Court please, the defendant respectfully moves the Court for an order directing the jury to return its verdict against the plaintiff and in favor of the defendant upon the following grounds, to-wit: One, there is no evidence substantially satisfactory or otherwise that the defendant is guilty of negligence in any particulars charged in the pre-trial order, or; that any act or omission on the part of the defendant constituted a proximate or contributing cause of his injuries and death, and; thirdly, it furthermore appears from all the evidence in the case that the deceased was guilty himself of negligence constituting the sole, proximate, contributing cause of his death.

The Court: I think you are right, but I'm not going to make a determination. If you want to argue the matter we will hear you at 10:00 o'clock tomorrow morning.

Mr. Gearin: I do not intend to argue the matter, your [151] Honor. I have just made my motion, and I think it is well taken.

The Court: Do you want to argue it?

Mr. Sahlstrom: I think we should be heard, your Honor.

The Court: I will just say as far as the blue flag is concerned I think it has no relevancy to this case at all because even though the rules require them to have a flag and they did not have a flag in this case, Eastman knew that Lambert was under the

car, and what more possible good could they do having a flag there? He was not going to be apprised of anything because he knew the dangers involved.

The testimony is undisputed that he was assigned to work on the flanger car and not on this car, and there is also testimony that he was told to keep away even though that was a little before. As far as any mechanical defects in the dump car is concerned, it would not have been on Track 15, it would not have been in the repair yard if it was in good condition. The reason it was there it was in poor condition and had to be repaired, and the law with reference to equipment that is in need of repair is somewhat different than the law with reference to items that are supposed to be in good working order, and here the testimony is also that so far as the locks were concerned in the first place, they had to keep the locks open in order to get the door down. That is what they were trying to do, and in addition to that, the witness [152] Lambert, I believe, testified that the door had not been fully closed, it was somewhat below the top, and, therefore, he could not close these locks, and one lock was off, one lock was open.

I do not think there is any evidence to go to the jury on, but I will hear you at 10:00 o'clock tomorrow morning, and I would suggest that you be here, Mr. Gearin.

Mr. Gearin: I shall, your Honor. [153]

Saturday, Jan. 22, 1955, 10:00 o'clock a.m.

(At this time counsel for the respective parties presented argument to the Court on defendant's motion for directed verdict.)

The Court: You have tried the case for a full day, and I think you have a right to have this case appealed, and I'm going to let you go to the jury, but I'm going to take this motion under advisement. I am not promising anything if a verdict comes in. You should know it right now, and if I do take any action I will not grant a new trial. I will just set aside the verdict and let you go up on it. [154]

Tuesday, Jan. 25, 1955, 10:00 o'clock a.m.

trial resumed

The Court: You have heard all the testimony, ladies and gentlemen of the jury. Now you are going to hear the arguments of the attorneys, and after that you will hear the instructions of the Court, and the case will be submitted to you. We will first hear from one of the attorneys for plaintiff.

(Thereupon the attorneys for the respective parties made their arguments to the jury.)

Court's Instruction to the Jury

The Court: Ladies and gentlemen of the jury:

You have now heard all the evidence and the arguments of the attorneys in the case of Teresa Eastman, Administratrix of the estate of Eric Gunner Eastman, plaintiff, against the Southern Pacific

Company, defendant. It is now my privilege and my duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that I am about to submit to you.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them in the evidence without bias, without prejudice, and without sympathy for or against either the plaintiff or the defendant. You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. Regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict on any other view of the law than that given in my instructions.

As I recently told you, you have heard the arguments of the attorneys, and what they say during the course of the trial in their arguments or to the Court is not evidence. I want to repeat. If your remembrance of any evidence is different than that related to you by a particular attorney, [156] then you rely on your own memory. The purpose of an argument to a jury is to suggest inferences and deductions which the particular attorney suggests can be drawn from the evidence. While you may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you, you are not bound to do so. You are the sole and exclusive judges of all the facts in the case, and you are bound only by the testimony and the other evidence which is before you.

A judge in the Federal Court has the privilege of commenting on evidence. I shall not do so in this case because the questions of fact to be decided by you have been fully and carefully argued, and in spite of the delay from last Friday until today the case was short and the facts largely undisputed. If you know or think you know by any expression or words of mine what I think about this case and how it should be determined, you are not bound by my opinion on that subject. I repeat that you are the sole and exclusive judges of all the questions of fact and the credibility of all witnesses; however, I will lay down for you certain rules of law which govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evidence that has been [157] introduced at this trial, that is, the testimony and the exhibits and the instructions of the Court without, as I told you, any feeling of sympathy or bias or prejudice. If you have acquired or believe you have acquired any knowledge or information concerning any issue involved in this case from any source other than the evidence, you are not to convey such information to any other juror, and you are not to consider it yourself.

The defendant Southern Pacific Company is a corporation. A corporation must necessarily act through individual persons. It is admitted that the other members of the train crew with whom the decedent was working at the time and place of the

accident were employees of the Southern Pacific and that they were acting in the course of their duty, of their employment, at such time. Therefore, if you find that one or more of such other employees did or failed to do something which under the circumstances amounted to negligence, then such negligence, if any, would be deemed to be the negligence of Southern Pacific Company.

This action was brought by the plaintiff, Teresa E. Eastman, as the Administratrix of her husband's estate against the Southern Pacific Company under and pursuant to an act of Congress known as the Federal Employers' Liability Act. This act provides in substance that a common carrier by railroad engaged in interstate commerce shall be liable in damages [158] to any person suffering injury or death while he is employed by such carrier in interstate commerce, for injuries resulting in whole or in part from the negligence of any officer, agent, or employee of the railroad company or by reason of any defect or insufficiency due to the company's negligence in its cars, appliances, machinery, tracks, or other equipment. In other words, the liability which this act imposes upon a railroad company is liability for negligence. The Act does not make a railroad company an insurer of the safety of the decedent or any of its employees; therefore, before you can find that the defendant is liable to the plaintiff as the Administratrix of her husband's estate you must find that the railroad company breached its duty to the decedent; in other words, that the railroad company was guilty of negligence.

The mere fact that an accident occurred is no evidence of negligence, and you may not find that the defendant was negligent solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault, nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party, that is, the railroad company and the decedent both, exercised the care which an ordinarily prudent person would have exercised under all the circumstances.

If the accident happened when all the parties were in the [159] exercise of due care, then the law would not impose liability upon anyone. If the accident were an unavoidable one, that is, one without the fault on the part of anyone involved, there could be no recovery in this case.

The law imposes upon the party who claims that another is at fault the necessity of proving that claim by evidence, and that claim must not only be proved by evidence but by the greater weight of the evidence. This is known in law as the preponderance of the evidence. In other words, the burden of proving an allegation by the preponderance of evidence is laid upon the party making the claim.

Preponderance of evidence means the greater weight of the evidence. The greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you may give to the witnesses or by reason of other evidence that may have been introduced. If you

find upon any claim of negligence set forth by the plaintiff against the defendant that the evidence is evenly balanced or inclines toward a contention made by the defendant, then the plaintiff is not entitled to recover on that particular issue.

It was the duty of the defendant towards Mr. Eastman to act as a reasonably prudent person under all the circumstances at the time and place of the accident and in view of the attendant danger. A breach of that duty is called negligence. [160]

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. In determining whether the defendant exercised reasonable care at the time and place of the accident its conduct is to be measured against the standard of what a reasonably prudent person would have done or would not have done under the same or similar circumstances and in view of the attendant danger.

In other words, the degree of care which a person is required to maintain varies with the conditions. The greater the hazard the greater the care that must be exercised, and this rule is applicable to both Mr. Eastman and to the employees of the defendant company, that is, Mr. Lambert and Mr. MacGregor and Mr. Barker.

The plaintiff was required to specify the manner in which she claims that the railroad company was a fault or in which the railroad company breached

its duty to Mr. Eastman. I instruct you that the plaintiff is bound by the allegations of negligence charged against the defendant which I will outline for you, and she must recover, if at all, in this action upon those allegations and no others. Therefore, if you should believe that the defendant was guilty of negligence in some particular not mentioned in my instructions, you may [161] not consider such other negligence even if you find that such other negligence existed.

Before I take up the particular charges of negligence I call your attention to the fact that during the trial there were certain statements made and exhibits introduced which have no relevancy to this case. One relates to a rule of the company which provides that in case of serious injury employees are required to call the nearest surgeon. In order for this rule to be applicable it would be required that the employees knew of the serious character of the injury or in the exercise of reasonable care should have known of the seriousness of the injury which the decedent sustained, and, likewise, the plaintiff would be required to show some causal connection between the failure to call a surgeon and the death of the decedent. In this case there is no such evidence, and you are therefore instructed to disregard any claim of negligence based upon such allegation.

Second: There was other testimony with reference to the fact that the company should have had blue flags or red flags to warn workmen of the presence of these cars on the track. This regulation

of the company has no applicability to this case because the testimony is undisputed that the decedent knew of the presence of this car on the repair track and the fact that it was being worked on; therefore, you are to give no weight or effect to the presence or absence of flags [162] whether they be blue or red. They have nothing to do with the case.

Finally, this might be an appropriate place to mention the fact which was mentioned by both the attorneys in the argument, that is, the testimony of Mr. Sutton. Mr. Sutton was called to testify not for the purpose of putting in substantive evidence. He was called merely to impeach the testimony of Mr. MacGregor, and that testimony may only be considered for that purpose and that purpose alone, whether you are to discredit Mr. MacGregor's testimony, and Mr. Sutton's testimony is not to be given any weight or effect other than that.

The claims of negligence upon which Mrs. Eastman as Administratrix must recover, if at all, are the following: First, in manipulating the dumping mechanism at a time when the door locks were in a state of repair and in an open position and decedent was standing in close proximity. That, Mrs. Eastman says, constitutes negligence. Now, you have heard the evidence, and I leave it to you to determine whether such conduct on the part of the railroad company's employees, even if proved by a preponderance of the evidence, amounts to negligence.

Negligence, as you will recall, is defined as the doing of an act which a person of ordinary pru-

dence would not have done under the same or similar circumstances or the failure [163] to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

In determining whether defendant was negligent you are to consider the fact that defendant is not under any obligation to render its employment absolutely safe, nor is it required to do everything humanly possible to prevent accident or injuries. It is only required to exercise reasonable care. You are likewise to consider the fact that defendant's conduct is not being judged by what which now may appear it could have done to avoid the accident after all the facts and circumstances are brought before you. The defendant is to be judged only by that degree of care and caution which would be exercised by a person of ordinary prudence under like circumstances, in other words, as the circumstances appeared to him at that time.

As I have previously stated, plaintiff has the burden of proving its specifications of negligence by a preponderance of the evidence, and you will therefore determine whether the allegation has been proved and whether such conduct amounts to negligence. After you have done that you will consider the other specifications of negligence asserted by the plaintiff against the defendant. In all of them Mrs. Eastman complains of the failure of the railroad company and its employees to warn her husband. For example, specification number 2 alleges that the railroad company was negligent in failing to warn plaintiff of the dangerous nature of the

particular dump car. [164] Specifications number 3: In failing to warn decedent that the door locks on the side on which the door was to be dropped were in an open position and in a state of (sic) repair; four, in failing to give the decedent any warning prior to the time Mr. Lambert manually forced into position the dumping mechanism which caused the door to drop on the decedent.

With reference to these three specifications, you will first have to determine whether the railroad company did in fact fail to warn the decedent of the things about which the plaintiff complains, and if you find that plaintiff has proved such failure by a preponderance of the evidence you will then determine whether such conduct amounts to negligence. In connection with this determination, I instruct you that the defendant was under no duty to warn an employee of danger that is obvious, open, and apparent or, if the decedent knew or in the exercise of reasonable care should have known of the dangers attendant on his being in the vicinity of the dump car when it was being worked on, then too there would be no necessity for the defendant to have warned him of such danger. You should also consider and use as a guide the definition of negligence that I have heretofore given you in connection with the first specification of negligence.

If the plaintiff fails to prove that the defendant was guilty of negligence in any one of the specifications of negligence that I have read to you, then your deliberations [165] will be at an end, and you will return a verdict in favor of defendant. If,

however, you find that the defendant was guilty of negligence as set forth in one or more of the specifications by a preponderance of evidence, you will then consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which alone or in conjunction with other causes produced the accident or injury. Thus, an act or omission of a person which sets in operation some factor or other thing that brings about an injury is held to be a proximate cause of the injury unless the causal force of the operation of the act or omission has been broken by some new or intervening cause prior to the accident. A cause without which a result would not have occurred is a proximate cause.

This does not mean that the law recognizes only one proximate cause of injury consisting of only one act or omission by one person. On the contrary, acts or omissions by one or more persons may operate or work concurrently either individually or together to cause an injury, and in such case each is regarded in law as a proximate cause. The plaintiff need not prove, in order to recover, that the negligence of the defendant was the sole proximate cause of the decedent's injuries or death. The defendant is liable to the plaintiff even though its negligence is only a contributing or a concurring proximate cause. [166]

The defendant has denied that it was guilty of negligence in any of the respects alleged by Mrs. Eastman, and it claims that the injuries which Mr. Eastman suffered were due solely to his own negli-

gence or inadvertence. The defendant has alleged that the decedent was guilty of negligence in certain particulars, and you may consider these specifications and no others. On the specifications of negligence asserted by the defendant against the decedent the defendant has the burden of proof, and, likewise, even if you believe that the defendant was guilty of negligence in some other particular not set forth in defendant's specifications of negligence you may not consider such other negligence even if you find that it did exist.

I want to call your attention again to the fact that if Mrs. Eastman has failed to prove any negligence on the part of the railroad company which caused the accident, then your deliberations will be at an end right then, and you do not have to consider these specifications which the railroad company has asserted against Mrs. Eastman, but if the plaintiff has proved that the railroad company was liable in any one or more of the respects that she has alleged and that was the proximate cause of the accident or a proximate cause, then you would consider these other specifications, and you would also consider it in connection with one other situation, and that is as you look over the whole testimony, all the testimony [167] as you are required to do, if you find that the plaintiff did something which the railroad company specifies was the sole cause of the accident, then, of course, the plaintiff cannot recover, and I will cover that right now.

The defendant has alleged that the decedent was guilty of negligence in three particulars and that

such negligence was the sole cause of the accident which resulted in his death. These are the three charges: First, that the decedent voluntarily left work to which he had been assigned and stood by and in close proximity to a dump car which was being repaired when there was no justification or excuse for his so doing; secondly, that the decedent failed to pay heed to the instructions and warning given by other employees to stand in the clear of said dump car; third, that the decedent suddenly and without warning left his place of safety along said dump car and walked forward directly alongside the dump car when he knew or in the exercise of reasonable care should have known that it was unsafe for him to have done so.

If you find that the decedent was guilty of negligence in one or more of the three particulars that I have read to you and that such negligence was the sole cause of the accident, the plaintiff may not recover. The reason for this should be fairly obvious. If the decedent was solely responsible for the accident which resulted in his death, then even though defendant did something which it should not have done or failed to do something [168] which it should have done such conduct could not have caused the accident if the decedent's conduct was solely responsible for the accident.

On the specifications of negligence asserted by the railroad company against the decedent the defendant railroad company has the burden of proof, and it must prove one or more of said allegations by a preponderance of the evidence, and, likewise,

it must show that such negligence was the proximate cause of the accident.

If you find that the defendant or one or more of its employees was guilty of negligence in one or more of the particulars that I have outlined to you, and if you also find that such negligence contributed to the accident and the resultant death of Mr. Eastman, then the plaintiff is entitled to recover even though you also find that Mr. Eastman himself was guilty of negligence which likewise contributed to the accident. This is true because under the Federal Employers' Liability Act negligence on the part of an employee such as Mr. Eastman which merely contributed to the accident can only be considered in mitigation of damages.

If you find in favor of Mrs. Eastman on the basis of the instructions that I have heretofore given you, then you should determine the amount of damages that plaintiff should be awarded. In assessing damages for the plaintiff upon her action to recover damages for the death of her husband you [169] will assess such sum of money as will be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits which would have resulted from the continued life of the deceased. That is to say, you will assess such sum of money as damages to plaintiff as she would have received as the wife of the deceased, Eric Gunner Eastman, had he lived. That is, the amount of damages should be the pecuniary benefits to her from the money that Mr. Eastman would have made. It is not how much money he brought into the home, for

example, but it is the net amount that she would have received plus the other pecuniary benefits which she would have received had Mr. Eastman lived.

You were instructed that under the American Standard Mortality Tables a man of 57 years has a life expectancy of 16.43; however, the decedent, Eric Gunner Eastman, his life expectancy is a question of fact for you to determine taking into consideration the decedent's age, sex, health habits, and the nature of his occupation, whether hazardous or not, and the fact that he has a life expectancy of 16.43 years does not mean that had he not been in this accident he would have lived that long or that he would not have lived longer, and, likewise, that life expectancy does not determine the number of years that he would have worked and earned money. He was 57. That would have brought him to about 73 and a half years old. In assessing plaintiff's damages, you may [170] take into consideration his life expectancy, as I have told you, and you may also take into consideration Mrs. Eastman's life expectancy determined as of the date of death of Eric Gunner Eastman. Mrs. Eastman at that time was 61 years old, and under the American Standard Mortality Tables she had a life expectancy of 14 years; however, plaintiff's life expectancy as the wife of the decedent is a question of fact for you to determine taking into consideration her age, sex, health habits, and the nature of her occupation, whether hazardous or not.

On arriving at the amount of pecuniary loss

which Mrs. Eastman would have sustained, you will determine whether the amount of damages to be awarded should be reduced because of any contributory negligence on the part of Mr. Eastman himself. If you find that Mr. Eastman was negligent in one or more of the respects charged and that such negligence contributed to his death, you will reduce the amount of damages which you have found in proportion to that amount of negligence of the respective parties. In other words, if you find that Mr. Eastman was contributorily negligent and that his negligence was responsible for fifty per cent of his fatal accident, then you would reduce the amount of damages by fifty per cent, and you would award plaintiff fifty per cent or one-half of the recovery which you would ordinarily have given her had Mr. Eastman not been guilty of any negligence. If the decedent's negligence contributed to the extent of ten per cent the award should be reduced by that amount, and if he were guilty of negligence to the amount of twenty-five or thirty-three and a third per cent then the award should be three-quarters or two-thirds of what would normally have been given plaintiff had her late husband not been negligent. These are merely examples, and you can do the same with any other proportion that you might figure out.

The amount of damages which you find which has, or probably will be sustained by plaintiff after the reduction, if any, because of any contributory negligence shall then be reduced to its present value, and such amount will be the amount of your verdict in

case you find that plaintiff is entitled to recover. However, as I previously told you, you will not be called upon to determine damages until and unless you find that the Southern Pacific Company was guilty of some negligence as alleged by the plaintiff and that such negligence caused or contributed to the accident and the resultant death of Eric Gunner Eastman, and the fact that I am instructing you on the question of damages that does not mean that I am or am not of the opinion that plaintiff is entitled to recover. On that issue I am expressing no opinion one way or the other.

This case is not to be tried on the basis of any sympathy or passion or prejudice. Your decision must be reached and [172] founded upon an unprejudiced consideration of all the facts and without any desire to punish anyone and without any thought of plaintiff's financial condition or the defendant's ability to pay. You are to be guided solely by the evidence in the case and by the rules of law which I have laid down for you.

You are the sole and exclusive judges of the facts in the case and the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary but must be exercised with legal discretion and in subordination to the rules of evidence.

The testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the

character of his testimony, or by evidence affecting his character or motives or by contradictory evidence.

If you find that a witness has testified falsely in any one material part of his testimony you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false it will be your duty to disregard entirely all the evidence given by such witness unless corroborated by other evidence which you do believe.

You should look with caution upon the oral admission of [173] a party or of a witness as that kind of evidence is subject to mistake. The party himself may have been misinformed or may not have clearly expressed his meaning, or the witness may have misunderstood him. That instruction with reference to oral admissions is relative to the testimony of Mr. MacGregor and Mr. Sutton. You will first have to decide whether the admissions alleged to have been made by Mr. MacGregor in Mr. Sutton's presence were actually made or whether Mr. Sutton may have misunderstood him.

You will have with you two forms of verdict, one for the plaintiff and one for the defendant. The verdict for plaintiff reads: "We, the jury duly empaneled and sworn to well and truly try the above-entitled cause, do find our verdict in favor of plaintiff and against the defendant and assess plaintiff's damages in the sum of blank dollars." If you decide in favor of plaintiff, you will use this form of verdict, and you will insert in that blank space the

amount to which you believe plaintiff is entitled. In the Federal Court the verdicts of the jury must be unanimous, unanimous upon every issue in the case; therefore, the verdict as to the amount, in the event you find for plaintiff, must be the considered judgment of each of the jurors.

It has been known in the past that in order to arrive at a verdict the jurors have agreed upon some mechanical process. For example, they have agreed that each one will put down on [174] a piece of paper the amount to which he or she believed the plaintiff is entitled, then added it up and got a sum, and then divided it by 18 and say this would be the verdict of the jury. You cannot agree in advance to anything of that kind. That is known as a quotient verdict, and it is illegal. Of course, if you come to the question of damages you are expected to discuss it with each other, but after you arrive at a verdict, in arriving at a verdict you must select the figure which is satisfactory to each of the jurors, and you cannot do it by any mechanical means.

If, on the other hand, you find against the plaintiff and in favor of the Southern Pacific Company you will use the form of verdict which reads: "We, the jury duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the defendant and against the plaintiff." Here, again, when you return that verdict it must be a unanimous verdict.

The verdicts provide only for signature by the foreman. Let me admonish the foreman, whoever

he or she may be, to make sure that the verdict that is signed represents the unanimous opinion of each of the 11 jurors.

Before the case is submitted there is a matter that I would like to take up with counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers:) [175]

Mr. Peterson: Your Honor, that rule as to procedure in the Federal District Court is a little unclear to me as to the manner in which exceptions must be taken. No exception is necessary, as I read the rule, when an objection is made.

The Court: You are going to have to object to any instruction that I gave that you believe erroneous, and if you think that I was in error in failing to give any requested instruction you will have to set forth the requested instruction that I failed to give.

Mr. Peterson: Plaintiff excepts to the Court's withdrawal from the consideration of the jury plaintiff's contentions 1, 4, 5, 6, 9 and 10 on the ground and for the reason that there is substantial evidence to submit to the jury on those questions.

The plaintiff excepts to the Court's instructing the jury that they would disregard all testimony in the case respecting the absence of a blue flag in violation of a company ruling respecting placement of a blue flag.

The plaintiff excepts to the Court's instructing the jury that the plaintiff was not entitled to recover if the decedent's death was due to unavoid-

able accident. The point of that exception is that there is no phase of this case that can be classified as being an unavoidable accident within the meaning of the decided cases.

The plaintiff excepts to the Court's instructing the [176] jury to disregard the company rule with respect to calling a surgeon upon injury coupled with the Court's statement that that rule could only apply if the employees had full knowledge of the seriousness of the injury sustained by the injured person and further instructing the jury that there must have been a proof of a causal connection between a violation of such company rule and death, the purpose of that being that we submit that that was proper evidence for the jury's consideration on the pain and suffering contention.

The plaintiff requests the Court that it instruct the jury that MacGregor's testimony was not an oral admission. The Court gave contradictory instructions to the jury in this respect. The Court advised the jury that the witness Sutton, that his testimony was solely for the purpose of impeaching the credibility of the witness MacGregor and that they could consider Sutton's testimony solely and only for that purpose and for no other purpose as it was not substantive evidence. Now, then, the Court later on instructed the jury the oral admissions of a party are to be viewed with caution, and the Court stated to the jury—

The Court: Yes, I think you are right. I will go back and tell them that the statement of Mac-

Gregor was not an admission and to disregard all the instruction with reference to admissions.

Mr. Peterson: I think that would be an error that one [177] could claim. I am calling it to the Court's attention.

The Court: I am going to clear that up.

Mr. Peterson: The plaintiff excepts to the Court's instructing the jury that no warning was necessary of an open, obvious conduct with application to the car because it has no application in this case. There is no showing that Eastman knew of any open or obvious omission. It was a comment on the evidence not merited by the evidence.

Plaintiff excepts to the Court submitting to the jury and instructing the jury that the defendant's contentions of sole negligence on the part of the decedent would be a complete defense to this action.

The Court: What did I say?

Mr. Peterson: The Court submitted to the jury the defendant's contention—the Court said to the jury that the defendant contends in this case that the accident was caused solely by the negligence of Eastman in three particulars, and those three particulars are set forth. Now, then, you said the defendant has the burden of proof on those three charges of negligence, and if the jury finds that any one of those charges of negligence was the sole cause, sole proximate cause of his death, then the plaintiff could not recover. The point of my exception is that first, as I read defendant's contentions, it is not claimed unless by use of the word "proximate" the defendant contends that it was the

sole proximate [178] cause. Paragraph 3 on page 10.

The Court: All right, go ahead.

Mr. Peterson: I think under the law and the facts in this case that those contentions could not be other than contributory negligence.

The Court: Go ahead.

Mr. Peterson: The plaintiff excepts to the Court's instruction to the jury only in part as to a quotient verdict. The Court instructed the jury, as I heard the Court and if my memory serves me correctly, that they could not agree beforehand to be bound by a mechanical means of a verdict which is a quotient verdict and which is condemned by the Courts and which was proper up to that point, but then the Court went on to say that they could not go in the jury room and use mechanical means to arrive at a verdict. As I understand the latest language concerning a quotient verdict, the evil of it is an agreement beforehand by the jurors to be bound by this mechanical method and not that they cannot use mechanical methods because they would have to use mechanical methods in the jury room in discussing and determining the plaintiff's damages.

The plaintiff excepts to the Court withdrawing from the consideration of the jury the plaintiff's contention of damages by reason of conscious pain and suffering of the decedent from the time of receiving the injury until his death. [179]

That is all, nothing further.

Mr. Sahlstrom: Do you recall that the Judge

when he read the specification, I think it is number 2, that he read "repair" in lieu of the word "disrepair" as to the lock. That is what my understanding is of what the Court said, that the lock was in a condition of "repair" instead of "disrepair."

(Discussion off the record.)

Mr. Gearin: The defendant, your Honor, respectfully objects to the failure of the Court to give its requested instructions numbers 1 and 2 on the grounds and for the reasons as set forth in our motion for a directed verdict which was taken under advisement by the Court.

We furthermore object to your Honor's submitting to the jury in any of its phases for the same reasons and the same grounds, we object to the failure of the Court to give our requested instruction number 6-A and -B on the ground and for the reason that the law is, as I see it, if the deceased met his death while engaged on a frolic he cannot recover, that being the substance of our request.

We object to the failure of the Court to give our requested instruction number 8 which submits to the jury the proposition that if an employee is given warning and he disobeys the rule of his employer and his death is occasioned as a result thereof there can be no recovery. [180]

We object to the failure of the Court to give our requested instruction number 10 which is a correct statement of the law to the effect that Lambert had a right to assume the deceased would remain in a

place of safety, he being seen there just before Lambert went under the car.

We object to the failure of the Court to give our requested instruction number 11 which we believe to be a correct statement of the law in regard to contributory negligence. A workman who unnecessarily put himself into a dangerous place cannot recover if there is a safer place for him to go.

We object to the failure of the Court to give our requested instruction number 56 on the ground and for the reason that it is entirely proper for the Court and the Court should give the instruction regarding income tax, the amount for which the jury award is, not subject to income tax, and the jury should be so instructed since there is testimony of his gross earnings.

The Court: Did you say that you were going to rely on my misstatements with reference to the admission, or did you say that that is something Mr. Gearin can rely on? Do you want me to go out there and reinstruct them on the question of admission?

Mr. Gearin: No, your Honor, I do not think so at this time.

The Court: Do you want me to do that? [181]

Mr. Peterson: No.

The Court: Do you withdraw it then?

Mr. Peterson: I withdraw it.

(Thereupon, the following proceedings were had in open court:)

The Court: You will have with you in the jury

room the exhibits that have been admitted in evidence, and you will have these two forms of verdict.

Swear the bailiff.

(Thereupon the bailiff was sworn.)

The Court: You are now excused.

(Jury retires for deliberation on a verdict.)

(Trial concluded.)

[Endorsed]: Filed April 7, 1955.

[Endorsed]: No. 14722. United States Court of Appeals for the Ninth Circuit. Teresa E. Eastman, Administratrix of the Estate of Eric Gunner Eastman, deceased, or individually as his surviving widow, Appellant, vs. Southern Pacific Company, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: April 8, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14722

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

STATEMENT OF POINTS

Comes Now the Plaintiff-Appellant and files this
her Statement of Points on which she intends to
rely in the appeal of this cause:

(1) The District Court erred in entering judgment for the Defendant notwithstanding the verdict returned by the jury in favor of the Plaintiff.

(2) The lower District Court erred in holding that there was no negligence on the part of the Defendant, which was the proximate cause of the death of the deceased, Eric Gunner Eastman.

(3) The lower District Court erred in refusing to follow the decision of the United States Supreme Court in the case of Wilkerson vs. McCarthy 336 US 53.

Dated at Eugene, Lane County, Oregon, this 12th day of April, 1955.

/s/ E. B. SAHLSTROM,
Of Counsel

[Endorsed]: Filed Apr. 14, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between John Gordon Gearin of Counsel for Defendant-Respondent and E. B. Sahlstrom of Counsel for Plaintiff-Appellant, that this Court may in the review and the consideration of this appeal refer to the original exhibits on file with the Clerk of this Court without the reproducing of the exhibits in the printed record.

Dated this 14th day of April, 1955.

/s/ JOHN GORDON GEARIN,
of Counsel for Defendant-
Respondent

/s/ E. B. SAHLSTROM,
of Counsel for Plaintiff-
Appellant

[Endorsed]: Filed Apr. 18, 1955. Paul P. O'Brien,
Clerk.

No. 14722

IN THE

United States Court of Appeals
For the Ninth Circuit

TERESA E. EASTMAN, Administratrix of
the Estate of Eric Gunner Eastman,
deceased, or individually as his sur-
viving widow,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for
the District of Oregon*

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FILED

OCT 20 1955

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No. 14722

IN THE

United States Court of Appeals For the Ninth Circuit

TERESA E. EASTMAN, Administratrix of
the Estate of Eric Gunner Eastman,
deceased, or individually as his sur-
viving widow,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon over the cause of action is conferred by 45 U.S.C.A. No. 51 and by 45 U.S.C.A. No. 56. Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00. The cause of action arose in Oregon. These agreed facts were set forth in the pre-trial order (Tr. 3) and conferred jurisdiction on the court below by reason of 28 U. S. C. A. 1331, 1332. (1) The jurisdiction of this court to consider this appeal is conferred by 28 U. S. C. A. 1291.

STATEMENT OF THE CASE

This was an action filed in the United States District Court for the District of Oregon for the recovery of damages for personal injuries resulting in the death of Eric Gunner Eastman. Plaintiff is the widow of decedent Eastman and brought this action as Administratrix of his estate and as his surviving widow. Plaintiff in her pre-trial order stated her cause of action on three theories:

(1) Under the Federal Employers Liability Act (45 U. S. C. A. No. 51) (Tr. 5-7).

(2) The Oregon Employers Liability Act. (No. 654.305 O. R. S.) (Tr. 7-10).

(3) On common law negligence. Plaintiff contended that the employer was engaged in a hazardous occupation within the meaning of the Workmen's Compensation Law of the State of Oregon (No. 656.022 O. R. S.) and that the common law defenses of contributory negligence, fellow servant and assumption of risk were no defense for the employer by reason of No. 656.024 O. R. S. (Tr. 10-13).

The cause was tried to a jury before the Honorable Gus J. Solomon on January 21, 1955. The trial court submitted the case to the jury solely on the first theory of plaintiff, namely, the Federal Employers Liability Act (Tr. 160). The jury returned its verdict in favor of the plaintiff and against the defendant and assessed plaintiff's damages in the sum of \$10,000.00. This verdict was filed January 25, 1955 (Tr. 17). Thereafter defendant filed its motion for judgment notwithstanding the verdict. (Tr. 18), and on February 4, 1955, the lower court on hearing said motion set aside the verdict of the jury in favor of the plaintiff and ordered that defen-

dant have judgment in its favor against the plaintiff. (Tr. 20.) In this order the trial judge stated that in his opinion the motion for a directed verdict made by the defendant at the close of the case should have been granted for the reason that there was no evidence that the defendant was guilty of negligence in any particular charged by the plaintiff. (Tr. 20.) It is from the action of the trial court in setting aside the verdict returned by the jury in favor of the plaintiff and in entering judgment for the defendant that this appeal is taken. The question presented for review on appeal is whether or not the defendant was negligent in any particular charged and whether or not the death of Eric Gunner Eastman resulted in whole or in part from such negligence within the meaning of the Federal Employers Liability Act.

SPECIFICATION OF ERROR NO. 1

The lower court erred in setting aside the verdict returned in favor of plaintiff and in entering judgment for the defendant. (Tr. 20.)

ARGUMENT

(a) Summary of Argument.

- (1) Factual outline
- (2) Review of the Federal Employers Liability Act and recent decisions.

Factual Outline:

On October 16, 1952, Eastman was employed in defendant's Eugene yards as a millman. His immediate supervisors were Jerome Lambert, a lead man, and Carl M. Wood, his foreman. His regular duties as a millman were to work in the mill room of the defen-

dant's repair shop as a carpenter and to do the carpenter work in railway cars on the repair track. (Tr. 29.) On this day Eastman was working on a flanger car which was immediately adjacent to a maintenance of ways Clark type dump car on Track No. 15. This repair track runs from East to West. (Tr. 107.) The flanger car was immediately west of the dump car. (Tr. 109.) Prior to the day of the accident, Foreman Wood had instructed Eastman on the job of moving the seats in the flanger car from one side to the other. (Tr. 80.) No particular time was specified for doing this work and Eastman had a good deal of discretion as to when and how the work should be performed. (Tr. 88.) Eastman would be required to move in and about the repair yard to and from the mill room for lumber or tools and to and from the flanger car. (Tr. 88-89.) Carmen McGregor and Barker had been assigned to the repair of the dump car to the East of the flanger car. (Tr. 110.) The dumping mechanism on the dump car was defective and the car had been placed on Track No. 15 to make the dumping mechanism operative. McGregor and Barker made two applications of the air and the car would not dump. They had been at the dump car about 20 minutes when Lambert, the lead man, arrived and saw they were having difficulty. (Tr. 112.) Shortly after Lambert arrived at the dump car, McGregor saw Eastman for the first time. (Tr. 112.) Eastman came to the East end of the dump car. (Tr. 113.) Lambert apparently walked around the car and then started under the car on the South side. (Tr. 115.) At that time, according to McGregor's testimony, Eastman was standing with McGregor about 7 feet from the track and about one-third of the length of the dump car from its East end. (Tr. 115.) We believe that it is fair to state at this point that the testimony as to the events that

transpired hereafter is in conflict. McGregor on direct examination testified that as Lambert went under the dump car, "Eastman took about two steps with him, and he had his finger on him," that Lambert then applied the pick handle to the buckled dumping arm, the door dropped and struck Eastman on the head. (Tr. 118.) Again on redirect, McGregor testified as follows: (Tr. 124.)

The Witness: "Yes he pushed under after him, he pushed toward him after him, had his finger out pointing to something where he went."

McGregor testified further that he was seven feet from the track when the door fell down. (Tr. 118.) The credibility of the testimony of witness McGregor was put in question by Coroner Sutton who made the official investigation the day after the accident. He testified that McGregor said,

"Eastman had just gotten down off of the flanger car and walked around to talk to McGregor, they were both standing together. No mention was made of him walking under the car." (Tr. 136.)

"... and I am sure that McGregor said he jumped back out of the way. There was nothing ever said, to my knowlege, about him walking back under the car or walking towards the car, to the best of my recollection." (Tr. 132.)

McGregor had denied making any statement of this nature. (Tr. 129.) According to Lambert, the last time he saw Eastman before he went under the car he was standing beside McGregor. (Tr. 70.) Directly after the accident Eastman was six feet from the rail on the ground according to Lambert. (Tr. 61.)

The particular dump car being repaired was of an intricate design and complicated mechanism. The workmen assigned to this repair were not familiar with its complex mechanism. Lambert testified that he had not worked on this type of car prior to the accident. (Tr. 45.) McGregor was actually a regular cook and dishwasher but classed as a car repairman. (Tr. 101.) McGregor testified at Tr. p. 114-115:

Q. Mr. McGregor, had you seen this kind of car in operation before, this dump car?

A. It was a very rare car around this vicinity. I saw one once before; yes, I did.

Barker, the other repairman, testified on this point as follows:

Q. You are not acquainted with the particular mechanism of this car, are you?

A. No, sir.

Q. That is why you called Mr. Lambert over, isn't it?

A. That is right.

Barker again testified: (Tr. 72).

Q. Prior to October 16th of 1952 had you ever worked upon a Clark type of western dump car?

A. I don't know whether I had or not.

Q. Do you think you did, or didn't you?

Mr. Gearin: He said he didn't know.

The Witness: I don't know whether - - - there ain't very many of them come through.

For a detailed explanation of the mechanical parts and operation of this dump car we direct the court's attention to the testimony of Witness Lambert, who, since the accident, appears to have acquired a rather healthy familiarity with its mechanism. For our purposes here it is sufficient to state that its mechanism was complex, there was a general lack of familiarity with its operation by the workmen assigned to its repair and

a complete failure on the part of the defendant to show by any satisfactory evidence that Eastman had been fully advised of all of the dangers attendant at the time of the accident. At the time Eastman arrived at the scene the air had been hooked up and applied to the dump car. (Tr. 112.) The pistons on the end of the car had been turned and placed in a position to dump the car to the South. (Tr. 75.) The door hooks on the top on the South side were in an open position and the door or apron slightly ajar. (Tr. 55.) The third and last locking device was a valve located under the car. (Tr. 36.) This too had been turned and was in an open position for dumping to the South. So it was at this time that all of the car locks were open and the lock on the Southeast corner was burned off. (Tr. 47.) The only thing that prevented the car from proceeding through the dumping cycle was a buckled arm on the South side. (Tr. 56.) When Lambert proceeded under the car, he took a pick handle and manually pried this arm into position. (Tr. 54.) The trap was sprung, the door dropped like a guillotine and Eastman was the victim. Lambert knew when he went under the car that it was possible the door would drop and probably would. (Tr. 56.) While under the car, Lambert faced the North and turned his back to Eastman while he pried the buckled arm. (Tr. 60.) Lambert knew at the time he pried the buckled arm that Eastman, Baker and McGregor were all in close proximity. (Tr. 60.) Defendant alleged contributory negligence of decedent in failing to heed a warning to stand in the clear, in leaving a place of safety and in walking forward to the dump car. (Tr. 14.) The trial court carefully instructed the jury on this phase of the case and the jury undoubtedly took into consideration some element of contributory negligence in returning a rather nominal verdict for the plaintiff.

(B) *Review of Federal Employers Liability Act and Recent Decisions.*

The Federal Employers Liability Act sets forth the rights of employes of railroads engaging in interstate commerce to recover for their injuries sustained in the course of their employment, and in case of death, the right of their personal representative to recover damages for the benefit of their dependents. Before the enactment of that Act, an injured railroad worker had a right to sue his employer at common law. The railroad had available such defenses as the fellow servant doctrine, contributory negligence as a complete defense and the doctrine of assumption of risk. As a result, the railroads were well insulated against liability and very few injured railroad workers ever received compensation for their injuries. It was to correct these evils that the Federal Employers Liability Act was passed.¹

The first Employers Liability Act was enacted by Congress in 1906.² It was declared unconstitutional by the United States Supreme Court in the first Employers Liability cases,³ because they included those engaged in intrastate traffic at the time of their injury. The Court declared that Congress had no power to regulate intrastate commerce. Congress in 1908 enacted the second Employer's Liability Act correcting the constitutional defect which appeared in the first Act.⁴ This Act was declared constitutional by the Supreme Court in the second Employers Liability Act cases.⁵ Thus the Federal Employers Liability Act has been in continu-

1. *Baltimore & Ohio Ry. Co. v. Branson* (1916) 128 Md. 678; 98 A 225 reversed on other grounds (1917), 37 S. Ct. 244, 242 U. S. 623.

2. 34 Stat. at L. 232.

3. *Howard v. Central Railroad Co.* and *Brooks v. Southern Pacific Co.* 207 U. S. 463.

4. 35 Stat. at L. 65; 45 U. S. C. A. No. 51-59.

5. *Mondou v. New York N H & H R Co.*, 223 U. S. 1 (1912).

ous operation for 47 years and a great body of law has grown up concerning this Act. This Act has been amended only twice, once in 1910⁶ and again in 1939.⁷

The Act provides that every common carrier by railroad shall be liable in damages to any of its employes while he is employed by such carrier in interstate commerce for injuries resulting in whole or in part from the negligence of any one of the officers, agents or employes of the carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment.⁸ The Act applies only to railroad workers, that is, employes of common carriers by railroad. Under this Act, the railroad is also liable for the death of any employee under the above circumstances of negligence. In this connection the Act provides that the railroad shall be liable in damages in case of the death of such employe to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and if none, then such employe's parents, and if none, then of the next of kin dependent upon such employe.⁹ Since the passage of the 1939 Amendment, the question as to whether a railroad employe is engaged in interstate commerce is seldom raised. Even employes who are engaged in repairing equipment which is not in actual use have been held to be entitled to the benefit of the Act.¹⁰ The Act has also been held to apply to employes repairing cars. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 271, Mistretti was injured in the railroad shop while repairing a combination truck and

6. 36 Stat. at L. 291, 45 U. S. C. A. No. 56 and 59.

7. 53 Stat. at L. 1404, 45 U. S. C. A. No. 51, 54, 56 and 60.

8. 45 U. S. C. A. 51.

9. 45 U.S.C.A. 51

10. *Edwards v. B & O Railroad Company*, 131 F. 2d. 366

boom car, a unit of maintenance of way relief outfit used for clearing the track of obstacles. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 281, Rogers, the employe, was a switchman engaged in breaking up freight trains after their arrival at a terminal and making up such trains prior to their departure. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 283, the employe was engaged in the railroad shops in repairing a freight car used in both interstate and intrastate commerce. In *Lewis v. Industrial Accident Commission*, 19 Cal. 2d. 284, the switching crew of which Lewis was a member did not handle any cars destined for interstate commerce until after he was injured. In *Copley v. Industrial Accident Commission*, 19 Cal. 2d. 287, certiorari denied, 316 U. S. 678, the employe was injured while working as a carpenter on a railroad trestle over which cars moved in both interstate and intrastate commerce. The Act has also been held to apply to a carman's helper in the railroad company shops who was engaged in repairing several gondola cars which were used for the company's ballast to ballast yard track and main line tracks.¹¹ The Act has also been held to apply to a machinist's helper engaged in repairing a part of a locomotive in the railroad company's round house.¹² Federal District Judge Yankwich in the case of *Holl v. S. P. Co.*, 71 F. Supp. 21 has made an analysis of this situation and listed numerous cases where the Act has been held to apply. It is the exception today, rather than the rule, when the railroad company will deny that the injured worker was engaged in interstate commerce and put him to his proof on that issue as the defendant has done in this case. (Tr. p. 13.)

11. *S. P. Co. v. Industrial Accident Commission*, 88 Cal. App. 2d. 569

12. *Edwards v. B & O Railroad Co.*, 131 F. 2d. 366.

In recent years the tendency has been to allow juries to pass on all questions of fact in Federal Employers Liability Act cases. The United States Supreme Court has discouraged trial courts and lower appellate courts from taking cases from juries where any question of fact is involved, particularly since the decision of the United States Supreme Court in *Wilkerson v. McCarthy*, 336 U. S. 53. In that case the majority opinion was written by Mr. Justice Black. The facts of the case were that plaintiff a switchman, was injured when he slipped on grease which was on a narrow board walk extending over a wheel pit in the railroad company's yard. The trial judge directed the verdict in favor of the railroad company on the ground that said board walk was for the use of pit workers only and was not intended for use by switchmen. Mr. Justice Black in his opinion, at page 60 stated:

“It is true that witnesses for the respondent testified that after the chains were put up, only the carmen in removing and applying wheels used the board to walk from one side of the pit to the other. Thus, the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway or whether employes generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict. It was only as a result of this inappropriate resolution of this conflicting evidence that the State Supreme Court confirmed the action of the trial court in directing the verdict.”

Justice Black in *Wilkerson v. McCarthy* also stated at page 62, 63:

“Courts should not assume that in determining these questions of negligence juries will fall short

of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed question on whim, this Court, speaking through Mr. Justice Holmes, said, 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. Ed. 154, 160, 25 S. Ct. 3."

As further proof of the change of attitude by the United States Supreme Court concerning interpretation of this Act, we now direct this court's attention to the concurring opinion of Mr. Justice Douglas in *Wilkinson v. McCarthy*. We quote therefrom:

"While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases."

"The Federal Employers Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations. Not all these costs were imposed for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges have created numerous defenses—fellow servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability, even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability to lift from employes the prodigious burden of personal injuries which that system had placed upon them and to relieve men, who by the exigencies and necessities of life are bound to labor, from the risks and hazards that could be avoided or lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employe does his work."

“That purpose was not to give him a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. See *Seaboard Air Line Railroad Company v. Horton*, 223 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L.R.A. 1915 C. 1, Ann. Cas. 1915 c. 475. 8 NCCA 834; *Toledo, St. Louis & W.R. Co. v. Allen*, 276 U. S. 165, 72 L. Ed. 513, 48 S. Ct. 215 and the review of the cases in *Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, 62, 67, 87 L. Ed. 610, 614, 618, 63 S. Ct. 444, 143 A.L.R. 967. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This court led the way in overturning jury verdicts returned for employees. See *Chicago M & St. P. R. Co. v. Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; *Missouri P. R. Co. v. Aeby*, 275 U. S. 426, 72 L. Ed. 351, 8 S. Ct. 177; *New York C. R. Co. v. Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198. And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.”

“ . . . The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence since the condition was one created by the court and beyond effective control by Congress, it was appropriate and fitting that the court correct it. In fact a decision not to correct it was to let the administration of this law be governed not by the aid of the legislation to safeguard employees, but by hostile philosophy that permeated its interpretation.”

Also in *Wilkerson v. McCarthy*, Mr. Justice Douglas stated that a review of the cases coming to the United States Supreme Court from the 1943 term to the 1949 term showed a record more faithful to the design of the Act than previously prevailed. He thereupon set

forth in an appendix to his opinion a list of cases in which certiorari has been granted. He stated that during said period 55 petitions for certiorari were filed in railroad worker's cases and 20 were granted. Of these, one was granted at the instance of the employer and 19 were granted at the instance of an employee. In 16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In the one case granted at the instance of the employer, the Supreme Court held that it had received the jury trial on contributory negligence to which it was entitled. Of the 35 petitions denied, 21 were by employers claiming that jury verdicts were erroneous or that new trials should have been ordered. The remaining 14 were filed by employees. In ten of these, the lower court had withheld the case from the jury and rendered judgment for the employer. In three it had sustained jury verdicts for the employer, and in one, reversed a jury verdict for the employee and directed a new trial. From this group of cases, Mr. Justice Douglas makes three observations:

(a) The basis of liability has not been shifted from negligence to absolute liability.

(b) The criterion governing the exercise of the discretion of the Supreme Court in granting or denying certiorari is not who loses below, but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

(c) The historic role of the jury in performing that function is being restored in this important class of cases.

Another leading case decided by the United States Supreme court is the case of *Lavender v. Kurn*, 327 U. S. 645. In that case, which was a death case where no one

saw the accident occur and where the facts were entirely of a circumstantial nature, Mr. Justice Murphy said, at page 653:

“It is no answer to say that the jury’s verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.” Only when there is a complete absence of probative facts to support the conclusion reached, does reversible error appear, but where, as here, there is an evidentiary basis for the jury’s verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and the appellate court’s function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.”

We believe it is a fair comment to make that since the decisions of *Lavender v. Kurn* and *Wilkerson v. McCarthy*, it is indeed very rare today that a trial judge takes a case away from the jury or sets its verdict aside.

In determining whether or not there is sufficient evidence of a specification of negligence to carry a case to the jury under the Federal Employers Liability Act, the test is “evidentiary basis” or “reasonable inference from probative facts” and is no justification for withdrawing an issue of negligence from a jury that the question is merely close or doubtful or that the court might draw a contrary inference.¹³

13. *Lavender v. Kurn*, 327 U.S. 645; 66 S. Ct. 740 (1946); *O’Brien v. Chicago & N. W. Railway Co.*, 329 Ill. App. 382 391; 68 N. E. 2d. 638 (1946)

Only when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear.

To read into the Federal Employers Liability Act the degree of negligence required in order for an employee to recover from an employer is contradictory to the established course of liberal construction of the Act followed by the United States Supreme Court.¹⁵

The doctrine of assumption of risk does not obtain under the Federal Employers Liability Act and by abolishment of this defense in that statute, Congress did not mean to leave open the identical defense for the master by allowing courts to change its name to "non-negligence."¹⁶

It was not the province of the trial court to set aside the judgment for the plaintiff based on the verdict returned by the jury and substitute its own judgment that there was an absence of evidence of negligence.¹⁷

In discussing the recent cases under the Federal employers Liability Act, Raymond J. Moore, in an article entitled "Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers Liability Act" 29 Marquette Law Review 73 (1946) states at page 74:

14. *Lavender v. Kurn*, 327 U.S. 645, 653; 66 S. Ct. 740.

15. *Jamieson v. Encarnacion*, 281 U.S. 635, 640; 74 L. Ed. 1082, 1085; 50 S. Ct. 440; *Brown v. Western Railway of Ala.* 338 U. S. 294, 298; 70 S. Ct. 105 (1949); *Bly v. Southern Railroad Company*, 183 Va. 162, 31 S.E. 2d. 564; 32 S.E. 2d. 659 (1949)

16. 45 U.S.C.A. No. 51; *Tiller v. Atlantic Coastline Railroad Company*, 318 U.S. 54, 63 S. Ct. 444 (1943) *Ray v. Pennsylvania Railroad Company*, 71 F. Supp. 683; *Fussey v. Diesel Tanker Ellen Bushel, Inc.* 85 F. Supp. 92 (1949) *Fleming v. Husted*, 164 F. 2d. 65 (1947)

17. *Blair v. Baltimore & O. R. Co.* 327 U.S. 600, 65 S. Ct. 545, 547, *Vandalia R. Co. v. Kundall*, 119 N.E. 816, 819, *Pittman v. Schultz*, 125 F. 2d. 82. *Penn v. Galveston, H & SA Railway Co.* 82 So. 808, 810; *Williams v. Terminal Railroad Association* 20 S.W. 2d. 584.

“In conformity with the 1939 humanitarian amendment to the Federal Employers Liability Act the enlightened policy of the United States Supreme Court in several recent decisions has been to resolve all inferences in favor of the injured railroad employee. The Court has, in these cases, cast aside any denial of recovery on grounds of non-negligence or that the evidence was conjectural or too remote.” See also the “Federal Employers Liability Act,” Richter and Forer, 12 Fed. R. Dep. 13 (1951.)

As to the broad function of the jury in Federal Employers Liability Act cases, the United States Supreme Court has said:

“The choice of conflicting versions of the way the accident happened, the decisions as to which witness is telling the truth, the inferences to be drawn from the uncontroverted facts, as well as the controverted ones, are questions for the jury. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury’s function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury.” *Ellis v. Union Pacific Railroad Company*, 329 U. S. 649, 67 S. Ct. 598 (1947)

In reversing the judgment notwithstanding the verdict entered after verdict for plaintiff in the case of *Tennant v. Peoria & P. Railway*, 321 U. S. 29, 64 S. Ct. 409 (1944) the Court stated at page 35, as follows:

“It is not the function of the court to search the records for conflicting circumstantial evidence in

order to take the case away from the jury on the theory that the proof gives equal support to two inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusions as to the facts. The very essence of this function is to select from among conflicting inferences and conclusions that which is considered most reasonable. Upon an examination of the record, we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus, to enter judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to jury trial."

The issue of proximate cause as well as the issue of negligence is one for the jury's resolution. Relative to proximate cause, the United States Supreme Court has said:

"The fact that fair minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury." *Stone v. New York Central & St. Louis Railway Co.* 344 U. S. 407, 73 S. Ct. 358 (1952) Citing *Carter v. Atlantic & S. A & B Railway Company*, 338 U. S. 430, 70 S. Ct. 226 (1949) and *Coray v. Southern Pacific Company* 335 U. S. 520, 69 S. Ct. 274 (1949) and *Ellis v. Union Pacific Railway*, 329 U. S. at 653.

The cause need only be a cause in part to present a jury question. See *Carter v. Atlantic & St. A & B Railway Co.* 338 U. S. 430, 70 S. Ct. 226, and the opinion of

Federal Judge James Alger Fee, now of this Court, at 219 F. 2d. 205.

The weight and credibility of the testimony of the witnesses is for the jury as stated in *Chicago & Northwestern Railway v. Grauel*, 160 F. 2d. 820 (8 cr. 1947) at page 826:

“Thus the mere fact that the engineer as well as the other witness was called by the plaintiff did not bind the jury to accept the evidence given by them. The jury was still the judge of the credibility of these witnesses and of the weight to be given to their testimony. The jury could take into consideration in appraising this testimony the fact that they were employees of the appellant railway company and as such interested in avoiding imputations that their negligence caused the death of a fellow employee and the testimony of the engineer was not above question by reasonable minds. (In accord, *Ellis v. Union Pacific*, *supra*, and *Tennant v. Peoria & P U Railway*, *supra*.)

Inferences are also for the jury. *Lavender v. Kurn*, *supra*, and *Ellis v. Union Pacific Railway Co.*, *supra*. To prevent the jury's full function is to deprive the defendant of a jury trial which is his right. *Tennant v. Peoria & P U Railway Co.*, *supra*. In *Bailey v. Central Vermont Railway*, 319 U. S. 350, 63 S. Ct. 1062, at page 354 of the U. S. Reports, our Supreme Court stated:

“To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.”

The common law rule of the duty of the master to warn his servants of dangers within the course of his employment is found in *Prosser on Torts*, 2d. Ed. (1955) at page 376 as follows:

“A further obligation was to warn the servant of any danger connected with the work of which the master knew or which he might discover with proper care and of which the servant might reasonably be expected to remain ignorant.”

The Courts in cases under this Act assume the duty to warn without even considering it necessary to discuss that duty primarily. Their discussion is of the extent to which that duty must be carried out in order to prevent the conduct of the employer being considered negligent. As to this duty, the Supreme Court in *Tiller v. Atlantic Coast Line*, *supra*, at page 67 stated:

“The standard of care must be commensurate to the danger of the business.”

And in *Bailey v. Central Vermont Railway*, *supra*, at page 352 the Court said:

“The duty of the employer becomes more imperative as the risk increases.”

The rule that the standard of care must be commensurate with the danger of the business has been recognized by this Court in *Atchison, Topeka & S. F. Railway Co. v. Seamas*, 201 F. 2d. 140 (9 Cr. 1952).

In *Schnee v. Southern Pacific Company*, 187 F. 2d. 745 (9 Cr. 1951) in a case decided by this Court, the plaintiff was a workman required to use a motor car for performing his assigned duties. The car was derailed and the plaintiff was injured. There was physical circumstantial evidence that a stake was the cause of the derailment, having become lodged between the floor of the motor car and a cross tie. There was conflicting evidence in the record as to the origin of the stake. One theory was that it fell from the front of the motor car when the plaintiff was using it before, the other theory

was that it was a survey stake left by defendant's survey engineers to mark the place where ballast needed filling and leveling to the point indicated on the stake. There was evidence that defendant's agents did place this type of stake from time to time. There was evidence that the plaintiff had driven the motor car over this spot twice before the same day. At page 747 of that opinion, this Court stated:

“What we have said is not to be construed as a determination on our part that there was in the record specific evidence to show that any survey stake had been placed between the rails or that any employee of the defendant company had done any act or thing which could be characterized as negligence proximately causing the derailment of the motor car.”

It is to be noted that no one testified that there was a stake there or that one had been placed there. The jury was permitted to draw that inference assuming the facts to be as stated. The jury was also permitted to draw the inference of knowledge of the dangerous position of the stake or that by the exercise of reasonable diligence the agents of the defendant could have known of the dangerous position. This Court commented that the plaintiff's story as to whether he had a stake on the motor car was in contradiction of evidence as to prior inconsistent statements. It also commented that the theory the defendants espoused was supported by evidence in the record “tending to show considerable probability” and that there was evidence that the accident occurred as the defendant said, but since the evidence did not compel such a conclusion, it was error to remove the case from the jury.

In drawing its inferences the jury is justified in indulging the presumption that the decedent exercised

due care for his own safety at the time of his death. This is evidence to be added to the other evidence in the record. As stated in *Tennant v. Peoria & P U Railway*, supra, at page 34, our Supreme Court stated:

“To this evidence must be added the presumption that the decedent exercised due care for his own safety at the time of his death.”

The Court there was relying on the case of *A. T. & S. F. Railway v. Toops*, 281 U. S. 356, where it is stated:

“It is presumed that the deceased proceeded with diligence and due care.”

In the case of *Stanford v. Pennsylvania Railway*, 171 F. 2d. 632 (7th Cr. 1948) the Court said at page 634:

“To the evidence adduced must be added the presumption that Stanford was in the exercise of due care for his own safety.”

In *Aqua System v. Kodakoski*, 88 F. 2d. 395, it was held that the employer owed the employee the duty to use reasonable care in superintending and directing the latter's work, advise him of the method of doing it and to warn him of any unusual dangers not apparent so as to avoid any preventable accidents to him. Again in *Mather v. Rillston*, 156 U.S. 391, the Court said that if laborers engaged in hazardous occupations are not informed of the accompanying dangers by their employers and they remain in ignorance of the dangers and suffer in consequence, the employers are chargeable for the injuries sustained. In *McCalman v. Illinois Central Railroad Company* 215 F. 465, it was held that the duty of a master to warn his servants of perils to which they will be exposed extends to any change made by him which introduces into their service a new element of danger. In *O'Neil v. St. Louis I, M & S Railway Co.*, 9 F. 337, it was held an employer who intro-

duces without notice to his employee new and unusual machinery, whether it belongs to himself or another, involving an unexpected or unanticipated danger through the introduction of which the employee while using the care and diligence incident to his employment meets with an accident, is liable in damages. Again in *Thompson v. Chicago M. & St. P. Railway Co.*, 14 F. 564, it was held that if an employer knows or by the exercise of ordinary care might know of the hazardous nature of an employment, it is negligence for him to fail to warn his employee thereof and his failure to do so will render him liable to the employee for injuries resulting therefrom.

In the case of *Southern Pacific Company v. Guthrie*, 180 F. 2d. 295 (9th cir. 1949) a verdict and judgment were given for the plaintiff. Defendant railroad appealed on two grounds: (1) No evidence of negligence on its part and, (2) the damages were excessive. A rehearing was later granted on the excessiveness of the verdict as to the damages, but this does not concern the question of evidence to support the negligence. We will consider the case only as to the evidence of negligence. The facts were that the plaintiff was an engineer who had been ordered to Yuma from Gila Bend, Arizona, and could travel by freight or passenger train because of this order. He caught a freight train to Signal, Arizona, and then sought to catch a passenger train due through shortly. Because main line tracks were out of commission, the passenger train went by on the passing track and had to have a switch thrown to return to the main track upon which it would back to the platform for loading. The switch stand was across the main track from the loading platform, on the opposite side. Plaintiff, as is the custom with trainmen not otherwise

employed, was assisting the passenger train crew. He went across the track to the switch stand, threw the switch and gave the come ahead signal. The fireman had dismounted on the switch stand side of the track and started forward to throw the switch when he saw that plaintiff had thrown it. When the plaintiff signaled "come ahead" and started to cross the track, the fireman remounted. All he saw was the plaintiff start across the track. This was because the engine prevented him from seeing more. The fireman crossed over to the other side of the engine and saw the plaintiff's duffle bag, but not the plaintiff. He recrossed to the original side and still did not see the plaintiff. The engineer was on the switch stand side and his vision was obscured by the engine after the plaintiff started to cross. The train was going only three or four miles per hour. Plaintiff testified they were 200-250 feet away from him at the time he threw the switch. Plaintiff testified he stepped into a hole in the ballast which caused his foot to slip so that it became wedged between a tie rod between the switch track points and a switch tie. The court held that the plaintiff's evidence shows that the train could have been stopped, had the fireman informed the engineer at the time he noticed plaintiff was not across the tracks on the platform side. Therefore, it was negligence on the part of the fireman not to so warn the engineer, which proximately caused the injury to the plaintiff. Another ground of liability was found in that area around the switch did not constitute a reasonably safe place to work because of the hole in the ballast.

In the case of *Fritz v. Pennsylvania Railroad*, 185 F. 2d. 31 (7th cir. 1950) the facts were that the plaintiff's decedent had entered an open door of a plant which was a customer of the railroad in order to clear the tracks

which were known to him by experience to be usually littered with debris within the customer plant. The decedent had been in the building many times. He was a conductor. The normal procedure was that the train was not started in the doorway (which had insufficient clearance on one side, only seven to twelve inches, but had no sign upon that side, while it had sufficient clearance, over five feet, on the other side, upon which there was an impaired clearance sign) until the one who had gone inside to check the tracks gave the signal. One employee of the train company who was a part of this particular train's crew, was not experienced as to this building. He testified that plaintiff's decedent gave a back up signal with a hand in which he held a chunk of wood. He held a regulation signal lantern in his other hand and did nothing with that. Another witness who was not employed by the defendant railroad said that he saw no signal. The first witness testified that the back up signal was made continuously over a period of time. The court held that there was a jury issue for there was evidence of negligence if the jury believed the testimony of the witness who was an employee of the train company was not correct. The train employee witness had given the signal to the engineer who backed the car into the building, crushing the decedent on the insufficient clearance side. The engineer, due to the curvature of the track, was unable to see the position of the decedent at any time and had to rely on the signals of the employee witness who testified he saw the back up signal given by the decedent. By rejecting the testimony of the witness who claims that the back up signal was given, the fact, as assumed by the jury, was that a signal was given while one was in an area which was hazardous whereby the motion of the train was started which motion proved to be fatal. Thus, giving

the signal was a negligent act proximately causing the death of the decedent.

Although it is recognized that the following case is not binding authority upon this court, since it is tried under the theory of the Federal Employers Liability Act, its consideration may serve to indicate a general understanding of the nature of liability under the Act. The case is *Colorado & Santa Fe RR. Co. v. Blanton*, 284 Pac. 2d. 736 (Okla. 1935). In that case a cribber, which has rotating blades to dig between the ties, was being operated by one who was not the regular employee assigned for the purpose of moving to a side track. The rotating part of the blades were raised by this employee and at the same time, the plaintiff, a machinist for the defendant railway company, pointed to a union which was leaking oil and which apparently needed repairing with the purpose of showing the defect to another employee. Plaintiff's hand was cut off. Plaintiff's upper body was in view of the employee of the defendant operating the cribber. However, there was no testimony that this employee in fact saw the plaintiff, merely that he could have seen his proximity. The noise level was high. It was held that even though the negligence of the plaintiff in standing close was apparent, the plaintiff stated on cross examination that he was hurt because he was standing too close, there was evidence sufficient to make a case for the jury as to the question of whether defendant acted negligently in raising the cribber when plaintiff was in close proximity thereof.

In *O'Day v. Chicago River & Indiana RR. Co.* 216 F. 2d. 79 (7 Cir. 1954) the plaintiff was injured when he fell down a sharp embankment at a switch position while engaged in changing the switch. The erosion had

taken the ballast out from under the engine switching ties. A grasp of the switch light was required. According to plaintiff's testimony, a stranger came up and plaintiff straightened, lost his grasp on the light and fell. The plaintiff had been working in the area only a few days, "and had been warned earlier by the crew conductor of the dangerous condition existing around the switch." Upon this set of facts, including the warning of the dangerous character of the switch and the area there around, the jury returned a verdict for the plaintiff and the trial judge gave judgment notwithstanding the verdict in favor of the defendant, indicating as his reason that he doubted the plaintiff's story as a witness and believed the story of three of defendant's witnesses that plaintiff made the admission that he fell as a result of a private fight with a trespasser. The court of appeals reversed the judgment notwithstanding the verdict and ordered it vacated. Although the reason given was that the trial judge should not weigh the evidence or substitute his own conclusions for those of the jury, it is apparent that the fact that a warning was given did not absolve the company of its liability arising from the dangerous nature of the area surrounding the switch. Thus, a general warning was inadequate to discharge the company's duty of care owed to an employee.

In *Keith v. Wheeling & L. E. Ry. Co.*, 150 F. 2d. 654 (6th Cir. 1947) plaintiff was employed by defendant railroad and was the engineer of a train on that railroad that collided with another train on the defendant's track. The collision was of the head-on variety. Plaintiff alleged negligence of the defendant's conductor who was with him on the train in not warning him or otherwise stopping the train, since the train order that

governed the train of the plaintiff was clear in the regard that two trains were to pass the plaintiff's train from the other direction while the plaintiff's train was on a certain siding. Plaintiff himself had seen the orders and had repeated them to the fireman. The defendant's conductor had also seen the order and read it but lost it in the caboose after telling the flagman its contents. He made no effort in a 25 minute layover to find it again. The plaintiff's engineer mistakenly pulled out of the siding, believing the tracks clear, after only one train had passed. Two miles from the siding, that is, some time after the train had pulled out of the siding, the head-on collision occurred. The defendant's conductor had made no effort to stop the train, as he could have done. He made no effort to warn that there was a second train either before pulling out of the siding or during the two mile run. He testified that it sometimes occurred that the engineer received changed orders by phone at a siding and pulled out without consulting the conductor and that the conductor took a chance although company orders forbade this. Plaintiff denied such practice. A verdict was directed for the defendant and plaintiff appealed. The action of the court below was reversed and the case remanded. It was held error to direct the verdict since there was evidence of negligence of the defendant's employee, the conductor. The court stated that even though the plaintiff was obviously negligent, the Act requires that the railroad be liable for injury resulting in whole or in part from its negligence.

This case illustrates the fact that although one is warned specifically, as was the engineer in this case, failure to exercise ordinary care on the part of other employees of the defendant is sufficient to predicate the

defendant's liability. Its duty to exercise care is not discharged by a prior warning which subsequently proves inadequate where an ordinary person would have taken other action to prevent this accident.

In *Wilkerson v. McCarthy* at page 63 of 336 U.S. the Court rejected the argument of the Utah Supreme Court that since the plaintiff had overlooked the warnings of chains strung before a greased plank upon which he crossed, slipping and injuring himself, he would have overlooked also any other warnings, such as specific instruction by the railroad not to use the plank; that it was dangerous, or a sign pointing out the danger. The United States Supreme Court said that this was the drawing of an inference from the facts and that the jury must draw the inferences for itself.

In the case of *Johnson v. C. & N. W. Ry. Co.*, 64 N. W. 2d 372 (Minn. 1954) conductor ordered the train engine to go ahead to a side track to warn the train thereon that the train which was to pass there was delayed by safety appliance failure. The engineer wanted to stop at several intervening points to plant flags instead as the time element made it unlikely that they could reach the other train on time. Conductor, in charge of train, ordered "ahead" each time. Engineer's general, rather than specific, instructions were to disobey conductor if danger created. It was held that violation of general instructions was not a bar to his action.

In the case of *Tiller v. Atlantic Coastline Railroad*, supra, the District Court directed the verdict for the defendant. The Court of Appeals affirmed. The United States Supreme Court reversed. The affirmance below had been on the theory that no negligence was shown. The facts were that the plaintiff was struck by a car on the reverse end of one train while walking along

another train inspecting seals on the cars thereof, as his duties as a policeman for the line required. The plaintiff had been generally warned that in the switch yard employees must look out for trains as they, (1) carried no lights, and, (2) had no special lookout for the employees in the yards. No specific warning was given as to this particular train. The bell of the train was ringing, but the other train along which the policeman was walking was also moving. The complaint had alleged negligent operation of the train and failure to provide a safe place in which to work. The court conceded in its own statement of the facts that the plaintiff knew of the practice not to light or have a lookout placed on the rear of a backing train and had been, as an employee, instructed to look out for backing trains. On the train which struck the plaintiff there was a man with a lantern, but he was on a step of the caboose on the opposite side from the plaintiff's decedent, thus not visible and unable to see the decedent. The holding in this case is based upon assumption of risk. However, although the Supreme Court did not comment, it is obvious, since there was a warning as to the fact that trains carried no lights and had no lookout in the switch yard, that the Supreme Court considered the warning to be inadequate to relieve the defendants of their duty of care owed to the plaintiff's decedent. Apparently, only a warning which efficiently conveyed the fact that a train was backing toward the decedent would have been adequate.

In the case of *Ellis v. Union Pacific Ry. Co.*, *supra*, the plaintiff was crushed between a building and a car while he was standing on the ground in a position to relay signals of one on a loading platform, around a curve beyond the building, to the engineer. The engineer

could not see the position of the one on the loading platform. The place where the plaintiff was caught was the only place on the arc of the curve where the clearance was insufficient. Plaintiff did not, under his testimony, know the specific hazards of the area, with which he was unfamiliar. Defendant brought evidence to contradict the statement of unfamiliarity. Plaintiff saw no sign, if there was one. The defendant showed that there was a legible sign eight feet above the ground stating, "Impaired Clearance." The plaintiff had a verdict in the amount of Ten Thousand Dollars (\$10,000.00). The Supreme Court of Nebraska reversed for insufficiency of evidence to show negligence and ordered the complaint dismissed. In reversing that Court, the United States Supreme Court held that the jury could have from the facts drawn any one of three conclusions: (1) That the defendant was negligent alone; (2) That the plaintiff was solely negligent; or, (3) That both were negligent in ways contributing to the injury. As to the third, that the defendant was negligent, the Court said it would not have been unreasonable for the jury to have inferred, *inter alia*, that:

"The hazard was not readily apparent and in the form of a trap. That while the sign was placed so to be readily visible from a train, it was insufficient warning to a man on the ground." 352 of 329 U.S.

Thus, the Supreme Court again indicates that a general warning does not discharge the duty of care owed to a plaintiff employee to warn him of the dangers involved in the operation in which he is specifically engaged at the time, where the warning given does not apprise adequately of the specific dangers.

Another case showing that the jury may so infer is the case of *Stanford v. Pennsylvania Railroad*, *supra*,

wherein were no eye witnesses to the accident causing the death of plaintiff's decedent. However, plaintiff's decedent was apparently killed from being crushed between the coal slope of an engine tender and the plug end of a water pipe used to put the water in the tender, which consisted of a stand pipe, a horizontal section and a down pipe. The down pipe was bent and the plug closed after the accident, but no one actually saw what caused those circumstances. The decedent Stanford had gotten down from the engine after it had stopped at the watering station, unlatched the water pipe, turned it over the tender and had then gotten back up on the tender, pursuant to his duties as fireman. The man-hole for water was at the extreme rear of the tender, but when Stanford remounted, the brakeman's cabin on the rear of the tender, which was four and one-half feet high, prevented the plug coming directly over the water hole. The plug would not clear the cabin. It appeared from photographs in evidence that the only way it would clear was to swing the pipe and move the engine forward after the pipe was swung clear of the engine. The engineer sat with his back toward Stanford. He saw Stanford give a signal to move from 24 to 36 inches. He backed up about this distance, saw Stanford give a stop and heard him say, "That will do." He put air to the independent brake and stopped. When Stanford gave the stop signal, he was standing in front of the plug, but on the side of the tender away from which the stand pipe was located. After stopping the engine, the engineer looked up and saw Stanford's hand back over the coal slope. He went to see what the trouble was and saw him pinned by the plug and the slope. On trial, there was a verdict for the plaintiff but the Judge gave judgment notwithstanding the verdict in favor of the defendant, saying:

“The only reasonable explanation of the accident is that Stanford, upon giving the signal and before the engine stopped moving, stepped between the plug and the coal slope, placing himself in a position of danger. That his death was not the result of any negligence on the part of the engineer.”

In reversing and remanding, the Court of Appeals points out that only a complete absence of the probative facts to support the conclusions reached would justify a court in substituting its conclusions for that of the jury. This statement is found at page 634 of 171 F. 2d. 632. The court continued:

“This is so because the choice of conflicting versions of the way the accident happened and the decision as to which witness is telling the truth and the inferences to be drawn from the uncontroverted as well as controverted facts are questions for the jury.”

Thus, though the Judge thought one explanation more reasonable, the Court of Appeals indicated that the jury would have been justified in finding another explanation, which other explanation indicated negligence on the part of the engineer in moving the train after the stop signal had been given. If, as the engineer testified, no movement had been made, it would have been impossible for the fireman to have become pinned in the manner that he did. Even that proposition was gainsaid by an ingenious argument of defendant's counsel on appeal. The Court indicated that so long as the conclusion was a reasonable one, the jury was justified in reaching it.

In *Tennant v. Peoria & P. U. Ry.*, *supra*, there were no eye witnesses to the accident and it might be argued from the fact that tiny bits of flesh were found on the

third car from the engine that the decedent had been crawling between the cars or climbing over the cars and had dropped through. (The third car was not the lead car of the train being pushed.) It was, therefore not the movement without warning which caused the death of plaintiff's decedent, but rather it was the act of the decedent himself in crawling between the cars. The Supreme Court, notwithstanding this possible argument, allowed the jury to find for the plaintiff in its action in reversing a judgment notwithstanding the verdict after verdict entered for the plaintiff. Thus, the theory of negligence upon which the Court must have based its decision was that it was negligence for the engineer to move without warning when he knew the decedent had disappeared in the direction of the movement of the train, in other words, when he knew that the decedent was close in the proximity of the movement.

In *Boton & Maine Ry. v. Meek*, 156 F. 2d. 109 (1 Cir. 1946) the plaintiff's decedent, an employee of three months standing, was struck by a locomotive of the defendant being backed in a watch stand which consisted of a wooden platform. On either side were rails leading to a turntable. The platform was placed so close to the rails that the engines, especially the one concerned, overhung the platform up to 15 inches. The decedent's duty was to strip the locomotive of small tools. This was ordinarily done from the watch stand. As the hosteler, who was alone in the locomotive, backed the engine in he could not see the stand because of the tender. Plaintiff's decedent knew that the engine was going to arrive some time in the near future because he had been sent there to strip the tools from it. The watch stand was highly illuminated. The rear of the tender

had a searchlight, but apparently the bright illumination cancelled out the light of the search light. The night was clear. Some witnesses testified the bell was ringing. One witness didn't recall hearing it. No whistle signal was given. The two specifications of negligence submitted to the jury whereupon a verdict for plaintiff was returned were, (1) for negligent operation of the locomotive and (2) for failure to provide a safe place in which to work. In holding there was sufficient evidence to make a jury question on both specifications, the Court said:

“The jury could in reason find that the failure to provide . . . certain precautions in addition to those provided, constituted causal negligence.”

The Court held that even though the engine was being operated in the customary manner, the jury could have found that the failure to warn of its approach by whistle signal, even though the decedent was expecting the engine, was negligence.

In *Thomas v. Union Pacific Ry. Co.*, 216 F. 2d. 19 (6 Cir. 1954) it was held that knowledge of the plaintiff of the danger does not prevent his recovery, since he does not assume the risk of the danger. In this case the plaintiff was injured as a result of a slip and fall on a grease-covered concrete round-house floor. The decision of reversal was based upon an erroneous instruction which stated that if the plaintiff knew the danger or if it was obvious to him as to the defendant railroad, then the defendant was not responsible for this injury.

Conclusion

Although plaintiff alleged ten specifications of negligence in her pre-trial draft under the first alternative theory that her cause of action came within the purview of the Federal Employers Liability Act, (Tr. 5-7) only specifications No. 2, 3 and a portion of No. 7 were submitted by the trial court for the jury's consideration. Following are the court's instructions on the specifications of negligence submitted to the jury:

“The claims of negligence upon which Mrs. Eastman, as Administratrix, must recover, if at all, are the following:

1. In manipulating the dumping mechanism at a time when the door locks were in a state of repair and in an open position and decedent was standing in close proximity.” (Tr. 164)

“After you have done that you will consider the other specifications of negligence asserted by the plaintiff against the defendant. In all of them, Mrs. Eastman complains of the failure of the railroad company and its employees to warn her husband. For example, specification No. 2 alleges that the railroad company was negligent in failing to warn plaintiff of the dangerous nature of the particular dump car. Specification No. 3: In failing to warn decedent that the door locks on the side on which the door was to be dropped were in an open position and in a state of repair (sic); four in failing to give the decedent any warning prior to the time Mr. Lambert manually forced into position the dumping mechanism which caused the door to drop on the decedent.” (Tr. 165-166)

We now review the probative facts which support the jury's conclusion that the defendant was negligent, in whole or in part, as charged in the court's instructions. In doing so we must keep in mind that if there

is any evidentiary basis or any reasonable inference to be drawn from the probative facts, then the jury's conclusion must stand and we are not permitted to substitute our own conclusions even though we believe them more reasonable. First, we give consideration to the specification of negligence No. 2 contained in the pre-trial order. (Tr. 5)

“In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.”

As Lambert started under the car on the south side, according to McGregor's testimony, Eastman was standing with McGregor about seven feet from the track at about one-third of the length of the dump car from its east end. (Tr. 115) McGregor testified further that he was seven feet from the track when the door fell down. (Tr. 118) Directly after the door fell down, Eastman was six feet from the rail on the ground, according to Lambert. (Tr. 61) An examination of the photographs of the dump car received in evidence indicates that the dump car extends several feet out and beyond the rails. According to the testimony of Lambert, the dump car door on the south side on which Eastman and McGregor were standing was approximately 30 inches high (Tr. 68) and the door did not drop all the way down to the side of the car but dropped down so as to be in a horizontal position, level with the floor of the car. It would be fair to conclude then, that the outside edge of the door would extend to a point approximately six feet or more to the south of the rail referred to by McGregor and Lambert in their testimony. Certainly, if the testimony of McGregor is to be believed that he and Eastman were seven feet from the rail when Lambert went under the car, then both Mc-

Gregor and Eastman were in close proximity when Lambert turned his back on Eastman and McGregor and manipulated the buckled dumping arm which caused the dump car door to drop. On the other hand, the jury may have believed McGregor when he testified that as Lambert went under the dump car Eastman took about two steps with him and he had his finger on him. That Lambert then applied the pick handle to the buckled dumping arm, the door dropped and struck Eastman on the head. (Tr. 118) Again (Tr. 124) McGregor testified as follows:

“Yes, he pushed under after him, he pushed toward him after him, had his finger out, pointing to something where he went.”

Certainly, if the jury believed this testimony, Eastman was in close proximity, in fact directly under the dump car door, and under no circumstances should Lambert have manipulated any device that would cause the door to drop. The jury, however, may have disbelieved McGregor entirely and may have given great weight to the testimony of Coroner Sutton to the effect that Eastman and McGregor were standing side by side and that as the door came down, McGregor jumped back out of the way. (Tr. 132-136). Considerable doubt was cast on the credibility of the witness McGregor by the testimony of witness Sutton and the jury may have disbelieved his testimony entirely or they may have believed certain portions of it. In any event, Eastman and McGregor were certainly both in close proximity when Lambert manipulated the buckled dumping arm which on both Eastman and McGregor and was facing the caused the door to drop. Lambert had turned his back North. (Tr. 60.) An examination of the photographs indicates that had Lambert looked to the south in the

direction in which the car door was to be dropped when the car dumped, that he would have and could have seen either McGregor, Eastman or both. His testimony on this point indicates that he could have seen Eastman, had he looked, but he did not look and had his back turned on Eastman. (Tr. 60.) The evidence showed that Eastman had a tool in his hand at the time when he was struck by the car door. (Tr. 65-67.) The jury had a right to believe that Eastman was going to or from the mill room and to or from the flanger car, either for the purpose of returning or getting more tools, or bringing lumber or working on some of the power equipment in the mill room necessary for the installation and removal of the car seats in the flanger car, and in doing so, would necessarily have to pass in and about the dump car. For the sake of argument, if the jury believed that Eastman and McGregor were standing side by side seven feet from the rail and the door itself was 30 inches in depth (Tr. 68) and extended out from the car 30 inches (Tr. 68) when in a horizontal position, then if the jury believed McGregor's testimony that Eastman was pointing at something under the car, it could be that Eastman had leaned forward. If Eastman leaned forward and kept his feet in the same position, then his body would, of course, extend forward for a distance of one foot or more and thus be within range of the falling door. The jury could reasonably have believed that Lambert had intended to dump the car to the North rather than to the South where McGregor and Eastman were standing, but had inadvertently misplaced the locks or valves allowing the car to move through the first phase of the dumping cycle to the South rather than to the North. Eastman may not have been advised, or at least fully advised, as to all the circumstances existing at that time or of the

intentions of Lambert, McGregor and Barker. Eastman may very reasonably have had the impression that they were attempting to dump the car to the North rather than to the South. Nowhere in the record did the defendant come forward and show that Eastman had any knowledge whatsoever of the particular hazards attendant with this operation. The silence of the defendants seems to indicate that they did not explain or warn Eastman that (1) each of the three locking devices on the car were in an open position; (2) the attempt was being made to dump the car to the South; (3) the air was hooked up to the car and had been applied at least twice to the car; (4) one of the locking devices was burned off; (5) the door locks at the top were in an open position allowing the car door to remain ajar approximately 2 or 3 inches; (6) the pistons on the ends of the car were placed so as to dump the car to the South; (7) that straightening the buckled dumping arm would cause the door to drop. The conclusion is inescapable that had the defendants made these facts known to Eastman that Eastman would not have remained standing where he did since he is presumed to have used due care for his own safety. Lambert indicated himself that he was not aware that the car would proceed through the dumping cycle, although he said that he was aware that it might. This was a possibility. (Tr. 56.) Lambert was the immediate supervisory employee and certainly Eastman had the right to believe that his supervisor would use care for his safety. Lambert indicated in his testimony that it was possible that there was sufficient air in the car lines to commence the first phase of the dumping cycle. (Tr. 55).

We conclude then from a review of the evidence on the phase of the case that the jury could have reasonably found that the defendants were negligent in ma-

manipulating the dumping arm when Eastman was in close proximity.

Following is a review of the testimony of the witnesses Lambert, Barker and McGregor on warning:

(a) Lambert: (Tr. 60)

“Q. Did you give any warning while you were under the car before you manipulated that dumping arm as to what you were going to do?

A. Not while I was under but just before I went under, yes.

Q. Did you make any statement at all while you were under the car manipulating that dumping arm?

A. No, none was required.

Q. And you knew at that time that Mr. Barker, Mr. Eastman and Mr. McGregor were all in close proximity, didn't you?

A. Yes.”

(b) Barker: (Tr. 81-82) on cross-examination.

“Q. Mr. Barker, while you were out there manipulating the valves for the air mechanism did you give any warning to Mr. Eastman?

A. Yes, sir.

Q. What did you tell him?

A. I told him, “You better get back out of the way. You might get hurt.”

Mr. Sahlstrom: Your Honor, we object to that question and ask that the answer be stricken for the reason that it is too remote in time. This is prior to the accident time.

The Court: Read the question.

(Last question read.)

The Court: How long was that before the accident?

The Witness: Oh, that was — I couldn't say exactly; a few minutes though.

The Court: Was it less than 15 minutes

The Witness: Oh, yes, I would say so.”

(On redirect Examination) (Tr. 82)

“Q. Mr. Barker, when you were operating those levers to try and dump that car, that was some time before Mr. Lambert came along; isn't that right?

A. Yes.

Q. And after a time you could not dump the car and then you got Mr. Lambert to come over and help; is that right?

A. Yes.

Q. So when you gave this warning to Mr. Eastman that was when you were operating the valves some time before; was it not?

A. That is right.

Q. You gave no warning to Mr. Eastman at all at the time Mr. Lambert was under the car and was trying to bring this door down, did you?

A. No, sir.”

(c) McGregor: (Tr. 121) (On cross examination)

Q. When you were standing in the clear there with Mr. Eastman before Mr. Lambert went under the car was there anything said to Mr. Eastman about his standing close by there or being in the vicinity?

A. Well, when I went on the other side of the car I told him to keep in the clear. I was afraid, you know, and this car being only able to dump on one side I wasn't afraid on that side.”

An examination of all the testimony quoted above indicates that nowhere was Eastman warned of the dangerous nature of this particular car as charged in specification of negligence No. 3. (Tr. 5-7). Eastman was a carpenter and the dump car that he was required to work next to and to pass about and around was a device apparently foreign to his supervisor, Lambert and his

fellow workers, Barker and McGregor. Barker had arrived first and set the air. (Tr. 110). McGregor then arrived approximately 7:55 A. M. (Tr. 109) and Lambert approximately 20 minutes later. (Tr. 112). Barker and McGregor had tried to dump the car, had opened the locks and turned the pistons on the end of the car. They were unable to dump the car and were having difficulties. (Tr. 112.) Shortly after Lambert arrived, McGregor saw Eastman for the first time. (Tr. 112-113.) Apparently then all of the preliminary work had been done by Barker and McGregor before Eastman arrived. When Lambert came on the scene, he walked around the car and observed the disabled dumping arm on the South side. So it was that the stage was all set when Eastman arrived and all that remained to be done to drop the 1 1/2 ton door was to "trigger" the buckled arm. Certainly, Eastman was on hand only for a brief moment and could not have been expected to know all of the dangers lurking in this complex mechanical device. The testimony of Lambert does not indicate what warning, if any, was given. The testimony of Barker was certainly unenlightening and was limited to a time when Barker was applying the air at the end of the car and the situation was entirely different for the reason that Barker was attempting to dump the car over on its side by the use of air pressure. The testimony of McGregor seems to indicate that his statement was made while he and Eastman were on the North side of the car. Eastman's lips were sealed by death, but McGregor, Lambert and Barker were present in court, called as adverse party witnesses, and had they given Eastman any or an adequate warning of the attendant dangers and perils prior to the accident, we are confident that this would have been fully developed by the experienced counsel for defendants on cross-examina-

tion or in their case in chief. Defendants pleaded the failure of Eastman to heed the warning to stand in the clear given by other employees. (Tr. 14.) The jury was fully instructed in this phase of the case by the learned trial judge and defendants had the opportunity of having this defense fully considered by the jury.

A unanimous Federal Court trial jury has rendered its verdict in favor of the plaintiff. We submit that from a review of all the evidence in this case that their conclusion had a reasonable basis and the verdict should be allowed to stand. The judgment for defendant notwithstanding the verdict entered by the trial court should therefore be set aside and judgment based on the verdict of the jury in favor of the plaintiff be entered.

Respectfully submitted,

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of Counsel for Plaintiff.

No. 14722

In the

United States Court of Appeals
For the Ninth Circuit

TERESA E. EASTMAN, Administratrix of the estate of
ERIC GUNNER EASTMAN, deceased, or individually as
his surviving widow, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

APPELLEE'S BRIEF

Appeal From The United States District Court
For The District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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vs.
SOUTHERN PACIFIC COMPANY, a corporation, *Appellee*.

APPELLEE'S BRIEF

Appeal From The United States District Court
For The District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

JURISDICTION

This is an action for damages brought in the United States District Court for the District of Oregon by appellant, a citizen of Oregon, as administratrix of the estate of Eric Gunner Eastman, deceased, or individually as his surviving widow, against appellee railroad, a Delaware corporation and employer of the deceased at the time of his death. Recovery was sought under the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C.A.

; the Oregon Employers' Liability Law, ORS 654.305 et seq.; and the Oregon Workmen's Compensation Law, ORS 656.002 et seq. The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00 (Tr. 3-13).

Appellant has appealed from the final judgment of the District Court, entered in favor of appellee, following a jury verdict for appellant and the subsequent setting aside of such verdict upon appellee's motion for judgment notwithstanding the verdict (Tr. 17-20).

The District Court acquired jurisdiction under 62 Stat. 989, 45 U.S.C.A. §56, and 62 Stat. 930, 28 U.S.C.A. §32. This court acquired jurisdiction under 62 Stat. 930, 28 U.S.C.A. §1291.

APPELLEE'S STATEMENT OF THE CASE

Appellee adopts appellant's statement of the question presented upon this appeal (Appellant's Br. 3):

"The question presented for review on appeal is whether or not the defendant was negligent in any particular charged and whether or not the death of Eric Gunner Eastman resulted in whole or in part from such negligence within the meaning of the Federal Employers' Liability Act."

ARGUMENT

The trial court properly set aside the verdict for appellant and entered judgment for appellee.

SUMMARY

I. The facts.

II. Comment upon certain matters contained in appellant's brief.

III. The deceased had been warned to stand clear of the dump car by each of the other three employees present at the time of the accident.

IV. As a matter of law, appellee was not guilty of actionable negligence towards the deceased.

I. The facts.

On October 16, 1952, the deceased was employed by appellee as a millman at appellee's yards in the city of Eugene, Oregon, and was assigned to work upon a flanger car then standing upon a repair track (Tr. 85-87). At the time in question, which was sometime between 8:15 and 9:00 A. M. (Tr. 73, 112), three other employees of appellee—Jerome Lambert, lead workman, and Austin E. Barker and Bruce MacGregor, carmen—were repairing a dump car which stood upon the same track as the flanger car and about two or three feet from it (Tr. 32, 49). These men were near the deceased when he was struck by the door of the dump car (Tr. 61, 77, 118), and it is to their testimony that we must look for the facts. Their testimony presents

single, consistent account of the accident, and is without disagreement or conflict in any significant

Lambert, the lead workman, had come over to the dump car to assist in the repair of the dumping mechanism, since Carmen Barker and MacGregor were familiar with it (Tr. 50, 75, 112). Upon arrival, he looked around the defective car (Tr. 51, 113) in order to search for the cause of trouble; at about this time, Barker shut off the air pressure to the car (Tr. 55, 77, 9). Eastman had arrived on the scene (Tr. 112) and was standing with MacGregor some seven feet from the track and alongside the dump car (Tr. 115, 116). Lambert proceeded under the car (Tr. 54, 76, 115) in order to attempt to pry an arm of the dumping mechanism that it might be raised into a position which would allow operation of the door (Tr. 52-54, 116), Eastman stepped forward (Tr. 118). Lambert had warned him (Tr. 60), Barker had told him to get back out of the way, that he might get hurt (Tr. 81), and MacGregor had told him to keep in the clear (Tr. 122). Although he was not assigned to any duties in connection with the dump car, but was, in fact, assigned to work elsewhere (Tr. 85-87), though he was but, at the time, a visitor or "kibitzer" at the scene, he stepped forward, just as Lambert, applying pressure to the arm

under the car, raised it into position. The arm straightened, and the side door or apron of the car dropped down, striking Eastman on the head (Tr. 54, 118).

II. Comment upon certain matters contained in appellant's brief.

1. The cardinal characteristic of this case, readily distinguishing it from nearly every authority upon which appellant has chosen to rely, is the want of conflict in the testimony of witnesses to the accident. The deceased was assigned to work elsewhere, but instead appeared at the point where the dump car was being repaired. Each one of the three whose duties required them to work upon the dump car warned the deceased. Nevertheless, the deceased, at a time when no amount of reasonable care by the other employees of defendant there present could have intervened to save him, moved forward to be struck by the dump car's falling door.

2. Appellee will not essay a case-by-case answer to appellant's authorities. The Federal Employers' Liability Act and the decisions thereunder are well known to both court and counsel. Suffice it to say that appellee has no quarrel with those many cases cited in appellant's brief in which liability of the defendant is bottomed upon breach of its recognized duty to instruct

where appropriate, to warn about machinery *to be used by an employee in connection with his assigned duties*. But by what logic is this duty extended beyond the employee assigned to work with such machinery so as to include, as well, all the other employees of a railroad? Should the duty be so extended because of the mere chance that one of those many might choose to be present by the scene of, for example, a machinery repair operation of no concern to him, and in the execution of which he has no assigned role or interest? Does a passing employee in such a case become, ipso facto, a beneficiary of a railroad's duty to instruct him as to the operation's details, or its attendant dangers, which in this case were obvious?

Similarly, appellee notes those cases cited by appellee which affirm a liability, found by the jury, is acknowledged by the appellate court in the light of evidence which negates the possibility of railroad negligence. Surely, in a factual dispute, the jury must decide, and, finding no other error, the appellate court must affirm. Where, as here, each witness to the accident agrees with every other, their testimony presenting a clear picture of a warned but careless man who, despite due care, walked forward to his injury, that line of cases involving disputed factual situations is seen to be irrelevant to appellant's cause.

Appellant has cited cases where a railroad defendant failed to warn an employee; that is not the instant case. Where these cases involve a question of want of warning to one assigned to work upon the machinery by which he is injured, their failure to support appellant is all the clearer.

3. There is no support in law for appellant's suggestions, as for example at page 38 of her brief, that the testimony of Deputy Coroner Kenneth Sutton amounted to substantive evidence of the accident's details. That official, not being present at the scene of the deceased's injury, could not testify for any purpose other than impeachment. The court (Tr. 128) prefaced Sutton's testimony with the statement that it was to be admitted

"* * * solely for the purpose of impeachment and not for the purpose of any substantive evidence."

See *Woody v. Utah Power & Light Co.*, 10 Cir., 54 F. 2d 220, 223.

4. Appellant, by stating at page 7 of her brief that appellee failed "to show by any satisfactory evidence that Eastman had been fully advised of all of the dangers attendant at the time of the accident," apparently attempts to pass on to appellee that burden of proof

which has belonged to plaintiffs through several centuries of Anglo-American jurisprudence.

5. Appellant speaks, as at page 43 of her brief, of having called MacGregor, Lambert and Barker as "adverse party witnesses." In this connection, appellant, upon the trial, attempted to impeach MacGregor, her own witness (Tr. 126). Rule 43 (b), Federal Rules of Civil Procedure, 28 U.S.C.A., states that

"A party may call an adverse party or an officer, director, or managing agent of a public or private corporation * * * which is an adverse party, and interrogate him by leading questions and contradict him and impeach him in all respects as if he had been called by the adverse party * * *"

The rule's requirement is certain; under its mandate, a party may call as an "adverse party witness" only an "officer, director, or managing agent" of an opposing party corporation. *Dowell, Inc. v. Jowers, et al.*, 5 Cir., 182 F. 2d 576, 581. Appellee believes, however, that the best statement of the rule's effect, and one which leaves the trial judge with appropriate discretion in the premises, is found in *Eckenrode v. Pennsylvania R. Co.*, 3 Cir., 164 F. 2d 996, aff'd. 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41, a suit against the railroad company under the Federal Employers' Liability Act by a widow, as administratrix, for damages resulting from her hus-

band's death. The trial judge permitted members of the train crew, which had been working with the deceased, to be examined as hostile witnesses. Stated the Court of Appeals at 164 F. 2d 999,

“Neither we nor the appellee quarrel with that exercise of discretion. Such permission gives the plaintiff greater latitude in the examination of his witnesses and the plaintiff is not bound by their testimony * * * *But a belief that that testimony is false will not support an affirmative finding that the reverse of that testimony is true* * * * Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile and will not testify in a manner which would support the complaint.” (Emphasis supplied)

Every witness is presumed to speak the truth, and MacGregor, Lambert and Barker are not barred from the benefit of that presumption by their status as railroad employees. Though appellant has indulged in speculation, as for example at page 39 of her brief, as to what happened, it is to the testimony of witnesses to the accident that we must look, without speculation, in order to determine the question of negligence. And if appellee by this test was guilty of no causative fault, then the action of the trial judge must be affirmed. For testimony adverse to appellant cannot be converted into testimony favoring her simply by labeling those who saw the accident “adverse party witnesses.”

III. The deceased had been warned to stand clear of dump car by each of the other three employees present at the time of the accident.

The three separate warnings to deceased have already been pointed out supra, and reference made to their documentation in the transcript of testimony (Tr. 60, 81, 122). The deceased, a long-time railroad employee who had worked in the repair yards at Eugene for at least eight or ten years (Tr. 26), was familiar with the nature of the accident scene as a repair track. Danger was indicated by the open hook on the car door, by the other hook's having been burned off (Tr. 60), and by the door's gapping open at the top (Tr. 60), ready to fall. The deceased had no duties where he stood, yet he did not leave. Even so, he was standing beside MacGregor and "well in the clear" of the car when Lambert proceeded under it to apply pressure to the dumping arm (Tr. 70). While working on the arm, Lambert had to confront it, and thus turn his back toward the deceased (Tr. 59, 60). Then, for some reason known only to himself, Eastman stepped forward (Tr. 63) and was struck by the falling door. The danger was obvious, so obvious, perhaps, as to take away any duty on the part of appellee to warn the deceased; see *Endell v. Chicago, R. I. & P. R. Co.*, 7 Cir., 184 F. 2d 83, 871. Yet he was warned by three men. As he was

seen by lead workman Lambert in a place of safety (Tr. 70) when Lambert started under the car, Lambert had a right to assume that he would stay there; *Wendell v. Chicago, R. I. & P. R. Co.*, supra.

IV. As a matter of law, appellee was not guilty of actionable negligence towards the deceased.

It was, of course, Eastman's duty to exercise reasonable and ordinary care for his own safety, and appellee could, because of his long service, rely in some degree upon his so conducting himself. It is, therefore, not actionable negligence on the part of appellee railroad to fail to anticipate lack of such care; *Atlantic Coast Line R. Co. v. Dixon*, 5 Cir., 189 F. 2d 525, 527, cert. den. 342 U. S. 830, 72 S. Ct. 54, 96 L. Ed. 628. Further, in view of the warnings to deceased, appellant should, as a matter of law, have been barred from recovery; *Chicago, St. P., M. & O. R. Co. v. Arnold*, 8 Cir., 160 F. 2d 1002, 1006.

It is axiomatic that, under the Federal Employers' Liability Act, a plaintiff must establish negligence on the part of a railroad defendant in order to recover. The railroad is not subject to that degree of liability imposed by a workmen's compensation law, nor is the railroad an insurer of the safety of its employees; *Wolfe*

Henwood, 8 Cir., 162 F. 2d 998, 1001, cert. den. 332 U. S. 773, 68 S. Ct. 88, 92 L. Ed. 357.

In *Eckenrode v. Pennsylvania R. Co.*, supra, 3 Cir., 162 F. 2d 996, aff'd. 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41, the deceased, a brakeman, effected a coupling between an eighteen-car train and four loaded coal cars, at which time power was applied in the engine and the train began its slow progress up a grade. Several times the wheels of the engine skidded and the engineer each time closed the throttle in order to try again to move the train. Deceased walked past the engine during this procedure, and exchanged a remark with the engineer. He then was seen to walk along the track some distance away from the engine, then to "diagonalize" back toward the train, and then to stoop and pick up something from the ground. Suddenly, there was a fatal accident. The deceased's head had somehow been struck by a lap and lead lever on the engine, a piece which shoots back and forth rapidly when the engine wheels skid instead of revolving in normal fashion. A verdict in favor of plaintiff in the sum of \$10,000 was set aside by the trial court upon the basis of non-liability.

Bearing in mind that, in the instant case, Eastman was not even assigned to work at the place where he was injured, appellee would quote the following lan-

guage from the affirming opinion of the Court of Appeals at 164 F. 2d 999, 1000:

“Out of this we cannot see a scintilla of evidence on which negligence can be found * * * We think that there was nothing in his conduct to give notice to the engineer of any possible danger involved in the situation * * *

“The point we are making does not involve assumption of risk—that is out of this law. Neither does it involve contributory negligence * * * It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpected and unreasonable fashion * * *

“The brakeman, McGowan, saw Eckenrode stoop and apparently pick up something. Assuming that what he picked up was sand and McGowan should have recognized it, that would still leave no basis for finding negligence * * * Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpected operation on Eckenrode’s part.

“* * * so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case.”

And, upon further appeal, the United States Supreme Court affirmed, *supra*.

In the instant case, there are various allegations of appellee's negligence set out in the pre-trial order (Tr. 9); in every case, these allegations either failed of proof upon the trial or else are phrased in terms of a duty which appellee, as a matter of law, did not owe.

Nos. 1 and 2 disregard the fact that the door locks had to be open in order for the door to be moved.

No. 3 failed of proof.

No. 4 attempted to impose an impracticable burden upon appellee, and a duty not owed in law.

No. 5 failed of proof.

No. 6, as to deceased's location, failed of proof, and appellee's actions, could not have been the proximate cause of the accident.

No. 7, insofar as it relates to actual duty of appellee, failed of proof.

No. 8 failed of proof.

Nos. 9 and 10 failed of proof in that no showing was made that appellee, as a reasonable employer, could have known of the nature of deceased's injury.

The trial judge, who heard the testimony and observed the witnesses, simply could not allow a verdict

for appellant to stand. There was, in law, nothing upon which it could stand.

The United States Supreme Court, in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479, 64 S. Ct. 232, 88 L. Ed. 239, discussed the law applicable to the direction of verdicts in the following language:

“When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.”

Appellee readily admits the propriety of having the jury decide a question of fact, given such a question to decide. But where, as here, there is simply no evidence that appellee did anything to bring about the accident, but only evidence of the warnings received by Eastman prior to the time he stepped forward from his place of safety, then appellee insists that but one course is proper, and that is the one which the trial court took in entering judgment for appellee.

CONCLUSION

There is yet to be a recovery in a case such as this where there has not been at least some evidence of railroad negligence; indeed, there must be "more than intilla before the case may be properly left to the discretion of the * * * jury." *Brady v. Southern Ry. Co.*, 170 U. S. 476, 479, 64 S. Ct. 232, 88 L. Ed. 239. There being no sufficient showing of a breach of any duty owed by appellee to the deceased, the trial judge was compelled to enter judgment for appellee. Unless the requirement that a recovery under the Federal Employers' Liability Act be based upon railroad negligence is to be stripped of its plain meaning, that judgment must be affirmed.

Respectfully submitted,

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